IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 204, AFL-CIO and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,

Petitioners,

v.

LUNDY PACKING COMPANY, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The court of appeals in the instant case refused to enforce a bargaining order issued by the National Labor Relations Board on the ground that the bargaining unit set by the NLRB is not an appropriate unit by reason of the exclusion of employees in certain defined job categories. Those employees, however, had been permitted to vote "challenged ballots" in the representation election. And, when the NLRB, following the issuance of the court of appeals' mandate, proceeded to conclude the representation proceeding by counting the challenged ballots of the very employees whom that court had ruled should be included in the unit, the court below entered two orders barring the Board from doing so. The question presented is:

Did the court of appeals, by assuming conrtol over the conduct of an NLRB representation election through orders prohibiting the Board from counting the ballots, so exceed the scope of its reviewing authority and of its jurisdiction over unfair labor practice cases as to warrant summary reversal by this Court? *

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* The National Labor Relations Board was the petitioner in the court below and is a respondent herein.

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United Food and Commercial Workers, Local 204, AFL-CIO and International Union of Operating Engineers, Local 465, AFL-CIO, petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to enable the Court to review the decision and judgment—including two supplemental orders thereto—entered by the Court of Appeals in *NLRB v. Lundy Packing Co.* and *In re Lundy Packing Co.*, 4th Cir., Nos. 95-1364 & 96-1177.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *NLRB v. Lundy Packing Co.*, 4th Cir. No. 95-1364, is officially reported at 68 F.3d 1577

and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-11a. Subsequent to issuing its opinion, the Court of Appeals issued two orders jointly in that case and in *In re Lundy Packing Co.*, No. 96-1177; those orders are unreported and are reprinted at Pet. App. 22a-28a.

The opinion of the National Labor Relations Board which gave rise to this proceeding is not officially reported and is reprinted at Pet. App. 29a-36a. Subsequent to the issuance of the Court of Appeals decision, the NLRB and its Regional Director entered two orders relevant here; those orders are not officially reported and are reprinted at Pet. App. 14a-21a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit in No. 95-1364 was entered on November 3, 1995. A timely petition for rehearing and suggestion for rehearing en banc was denied on January 2, 1996. Pet. App. 12a. On March 25, 1996, the Chief Justice extended the time for filing the petition for a writ of certiorari to and including May 1, 1996. Pet. App. 53a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved herein are reprinted as a statutory appendix at pp. SA-1 to SA-5 *infra*.

STATEMENT OF THE CASE

On March 23, 1993, petitioners United Food and Commercial Workers, Local 204, AFL-CIO and International Union of Operating Engineers, Local 465, AFL-CIO (collectively referred to as "the Union"), filed a representation petition with the National Labor Relations Board ("NLRB" or "the Board"), pursuant to § 9 of the National Labor Relations Act, as amended, 29 U.S.C.

§ 159(c) ("NLRA" or "the Act"). That petition—which covered the production and maintenance employees at the Clinton, North Carolina plant of respondent Lundy Packing Co. ("Lundy" or "the Company")—gave rise to a representation case ("the R case") before the National Labor Relations Board ("NLRB" or "the Board").

In that case, Lundy maintained that the production and maintenance unit proposed by the Union is not "an appropriate unit" within the meaning of NLRA § 9, and that the only appropriate unit is a "wall-to-wall" unit which also includes *inter alia*, clerical employees, hog buyers, quality control employees and industrial engineers. After conducting an evidentiary hearing, the NLRB Regional Director concluded that the unit proposed by the Union, with certain additions, is an appropriate unit, and the Regional Director scheduled a representation election to allow the employees in that unit to vote as to whether the employees wished to be represented by the Union.

Lundy petitioned the NLRB for interlocutory review of the Regional Director's decision in the R case and for a stay of the election. The Board declined the request but, recognizing that a "substantial issue" had been raised with respect to the exclusion of certain positions, the Board directed that employees in those positions be permitted to vote "challenged ballots" which would be segregated and sealed, to be counted only if the Regional Director's decision were reversed. Pet. App. 51a-52a. That is the Board's standard operating procedure in cases of this type. *See* NLRB Casehandling Manual, Part II, §§ 11338, 11344.

On June 3, 1993, the representation election was held and a majority of those in the unit, as determined by the Regional Director, voted for the Union. On appeal of the election to the NLRB, the NLRB sustained the determination that the unit in which the election was conducted is an appropriate unit, and the Union was certified in the

R case as the bargaining representative of the unit. Pet. App. 37a-50a.[1]

Following the NLRB's certification, Lundy refused to recognize and bargain with the Union. The Union thereupon filed an unfair labor practice charge, pursuant to § 10 of the Act, alleging that the Company had breached its duty to bargain collectively under NLRA § 8(a)(5). That charge gave rise to an unfair labor practice case (known in NLRB parlance as a "complaint" or "C case").

In the C case, Lundy admitted the refusal to bargain but on several grounds challenged the Union's certification in the R case, including the ground that the unit, as determined by the NLRB in the R case, is an inappropriate unit. On the basis of its earlier decision in the R case, the NLRB adjudged the Company guilty of an unfair labor practice and entered an order in the C case directing the Company to bargain with the Union. Pet. App. 29a-36a.

To obtain enforcement of its bargaining order, the NLRB filed a petition in the United States Court of Appeals for the Fourth Circuit; the Union intervened in that proceeding. Lundy again defended "principal[ly on the] basis [of] . . . its contention that the Board improperly excluded certain quality control employees from [the] production and maintenance bargaining unit." Pet. App. 1a-2a. The court of appeals agreed with the Company with respect to both the quality control employees and industrial engineers, finding that "[g]iven the community of interests between the included and excluded employees

[1] In considering challenges and objections to the election, the then-Regional Director reversed the original unit determination of his predecessor and directed, *inter alia*, that the ballots of the quality control employees and industrial engineers be counted. The Union appealed this ruling to the NLRB which reversed, sustaining the original Regional Director's decision with respect to these employees. (The Board's opinion in the R case is reported at 314 NLRB 1042; for the Court's convenience it is reprinted at Pet. App. 37a-50a.)

here, it is impossible to escape the conclusion that the [excluded employees] were excluded 'in large part because the [Union] do[es] not seek to represent them.'" Pet. App. 7a. That, the court below stated, is "a classic §9(c)(5) violation." *Id.*[2]

In a two-sentence conclusion to its opinion, the court stated:

> We do not reach [Lundy's] other assignments of error. For the foregoing reasons, we deny enforcement of the Board's order.
>
> ENFORCEMENT DENIED. [Pet. App. 11a.][3]

After reviewing the court of appeals' opinion, the NLRB determined to "accept[] the Court's denial of enforcement" (rather than petition for certiorari), Pet. App. 16a, and to proceed to count the challenged ballots of the quality control employees and industrial engineers in order to determine the majority sentiment in the unit which the court below deemed to be the appropriate unit. Towards that end, the NLRB "remanded" the R case to the Regional Director to "dispose of the challenged ballots in Case 12-RC-7606." Pet. App. 18a.[4] On Feb-

[2] NLRA § 9(c)(5) provides in part that, "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling."

[3] The Union filed a petition for rehearing and suggestion for rehearing *en banc*. That petition was denied by the court of appeals on January 2, 1996. Pet. App. 12a. On January 10, 1986, the court below issued its mandate, stating that "The judgment of this Court dated 11/3/95 takes effect today." Pet. App. 13a.

[4] The order quoted in text was entered by the NLRB on February 9, 1996. Three days earlier, the Board had entered an order remanding the C case to the Regional Director for the purpose of counting the ballot. Pet. App. 14a-15a. Lundy filed with the Board a motion for a stay of that earlier order, arguing that, by virtue of the court of appeals' decision, the Board no longer had jurisdiction over the C case. In its February 9th order the Board stated that it had intended to remand only the R case, and that the refer-

ruary 9, 1996 the Regional Director entered an order directing that the challenged ballots be opened and counted, in the presence of the parties, on February 16, 1996. Pet. App. 19a-21a.

To prevent the ballots from being counted and a determination made as to the desire of the employees in the appropriate unit for representation, Lundy filed with the court of appeals a motion to stay the Board's order; a motion to show cause why the Board should not be held in contempt; and a petition for a writ of mandamus, all premised on the theory that the NLRB was not permitted to count the challenged ballots of the very employees whom the court of appeals ruled should have been included in the unit.

In a three-page order entered on February 15, 1996—the day before the ballots were due to be counted—the court of appeals once again sided with the Company. The court below stated that because it had denied enforcement of the bargaining order entered in the unfair labor practice proceeding, "the attempt by the Board to revive the representation petition and the election that followed exceeds the Board's jurisdiction." Pet. App. 24a. That court added: "We reiterate our earlier order that enforcement of the Board's bargaining order is denied and that this case is closed in all respects." *Id.*[5]

In the wake of the court of appeals order, the Regional Director "postponed indefinitely" the counting of the chal-

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ence to the C case in the February 6th order was "inadvertent." Pet. App. 11a. The Board then entered the corrected order which is quoted in text. *See* Pet. App. 16a-18a.

[5] The court of appeals did not issue an injunction or a writ of mandamus out of "[o]ur respect for the Board." Pet. App. 24a. (The court below did docket the petition for a writ of mandamus as a separate proceeding and its order was entered jointly in that case (*In re Lundy Packing Co.*, No. 96-1177), and in the NLRB's original enforcement action (*NLRB v. Lundy Packing Co.*, No. 95-1364).)

lenged ballots, and the NLRB filed with that court a motion for reconsideration of its February 15th order. On March 25, 1996, the court of appeals denied that motion, again asserting that the Board, by proceeding in the R case—which was not before that, or any other, court—to count the ballots of the employees whom the court below had determined had been improperly excluded from the unit, somehow had "acted in clear contravention of its jurisdictional limits and sought to bypass" the court of appeals. Pet. App. 27a. The court below added:

> The court reiterates its respect for the Board's role in the area of national labor relations law. The court expects in turn respect for its process and its mandates. [*Id.* 28a]

REASONS FOR GRANTING THE WRIT

This Court, we know, is not a court of errors and appeals. But there are rare occasions—involving a court of appeals that strays far outside its authorized jurisdiction and does so in plain disregard of the applicable federal statute and this Court's decisions—that *do* warrant the exercise of the Court's supervisory jurisdiction in a summary manner that both vindicates the law and safeguards the Court's ability to meet its other responsibilities.

South Prairie Const. v. Operating Engineers, 425 U.S. 800 (1976), was such a case arising out of the National Labor Relations Act. The point of this petition is to show that this case, like *South Prairie*, merits both the grant of a writ *and* a summary reversal of the decision below.

Very simply stated, the court of appeals ran over the clearly-established limits on the judicial review of administrative agency actions—limits which rest on basic separation-of-powers principles—and did so to gain entrance into an enclave the Congress has sealed against direct judicial intrusion: the conduct of National Labor Relations Board representation proceedings. This form of

judicial overreaching poses a direct threat to a central tenet of the federal system for maintaining industrial peace—that the administration of the representation election process should be centralized in the NLRB. As such the court of appeals' error warrants swift and certain correction.

A. In his opinion for the Court in *Federal Comm'n v. Broadcasting Co.*, 309 U.S. 134, 141 (1940), Justice Frankfurter essayed the definitive statement of the difference in principle between the review by the courts of administrative agency action and the review by a higher court of a lower court decision. In administrative agency cases

> What is in issue is not the relationship of federal courts *inter se*—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. [309 U.S. at 141]

Thus, while the courts are empowered to "correct errors of law" by an administrative agency, *id.* at 145, "that authority is not power to exercise an essentially administrative function," *FPC v. Idaho Power Co.*, 344 U.S. 17, 21 (1952).

That being so, in an administrative agency case, once a reviewing court has "laid bare [an] error" and has "compell[ed] obedience to its correction," the court has "exhausted the only power which Congress gave it." *Broadcasting Co.*, 309 U.S. at 145. "*[A]n administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.*" *Id.* (emphasis added).

This rule of law has full application to judicial review proceedings coming out of the National Labor Relations

Board. For example, in *South Prairie Constr. v. Operating Engineers, supra,* this Court—in a *per curiam* opinion issued on the *certiorari* papers—overturned a court of appeals opinion because the appellate court had exceeded its authority as set out in *Broadcasting Co.* There, the NLRB had held that two wholly-owned subsidiaries of a single parent were separate employers. The D.C. Circuit reversed that NLRB determination and that court proceeded to *require* the Board to treat a combined unit of the employees of the two subsidiaries as an appropriate unit. This Court, after affirming the lower court on the single employer issue, held that the D.C. Circuit, in proceeding to reach out and decide the appropriate unit issue, had "invaded the statutory province of the Board." 425 U.S. at 803. Quoting from *Broadcast Co.*, the *South Prairie* Court stated: "the function of the Court of Appeals ended when the Board's error on the 'employer' issue was 'laid bare.'" *Id.* at 805-06. *See also NLRB v. Food Store Employees,* 417 U.S. 1, 9 (1974).

B. There can be no doubt that the court of appeals here similarly overstepped the limits of its judicial authority to review administrative actions. That court's office was to decide a legal question going to the appropriateness of the unit as determined by the Board. Once that issue was decided—through a determination that the NLRB, in delimiting the appropriate unit here, had erred in excluding certain job categories—the court of appeal's power was "exhausted." At that point, it was for the NLRB—the administrative agency charged by the Congress with administering the Act—to determine (subject, of course, to eventual judicial review) how, consistent with the lower court's decision, to best "enforc[e] the legislative policy committed to its charge."

The line of demarcation between that which is the court's and that which is the agency's goes to the very essence here. For the decision below opened a range of options for furthering the policies of the Act, including

counting the challenged ballots of the employees whom the court of appeals found had been improperly excluded; conducting a new election; or dismissing the representation proceeding and awaiting a new petition. In taking it upon itself to decide, *ab initio,* the soundest of those implementing approaches, the court below assumed a power of administrative determination the Congress has not granted to the judiciary.

C. To be sure, the court of appeals justified its supplemental orders as appropriate to vindicate its mandate. That justification is doubly flawed.

First, as we have just seen, given the ground of decision below, if the appellate court mandate had, in fact, precluded the NLRB from exercising its judgment in deciding how to proceed in the underlying representation case in order to effectuate the Act in a manner consistent with law, the mandate itself would be *ultra vires.* And, the court of appeals' actions in defense of its mandate stand on no stronger footing than the mandate itself.

Second, in any event, what the Board proposed to do following the court of appeals decision is, on any objective view, *entirely consistent* with the lower court's decision and mandate.[6] That "mandate" was to "deny enforcement of the Board's order," Pet. App. 11a, requiring the Company to bargain in the limited unit the Board had determined to be an appropriate unit.

The NLRB's proceedings following the lower court's decision in no shape, form, or manner sought to compel bargaining in the unit that court had deemed to be inappropriate or otherwise to give any renewed legal force to that unit. To the contrary, *what the Board proposed to do was to enfranchise (by counting the ballots of) the*

[6] That the court of appeals viewed its mandate otherwise is, of course, not conclusive. *See Broadcasting Co.*, 309 U.S. at 141 ("it is not . . . true that a lower court's interpretation of its mandate is controlling").

very employees whom the court of appeals had determined were wrongfully disenfranchised, so as to determine whether the majority of employees in the very unit that the court below deemed to be appropriate desired union representation.

If the supplemental ballot count showed majority support for unionization, the Board presumably would have certified the Union as the representative in the *court-decreed bargaining unit.* That new certification, in turn, presumably would have supported a new Union request for recognition and bargaining. Faced with such a request, the Company would have been free either to accede to the request and thereby accept the certification as lawful and proper or reject the request to generate a new test of the lawfulness of the new certification. Thus, the Board's proposed action did not—as it could not—revive either the bargaining unit which the court of appeals had determined was an inappropriate unit or the unfair labor practice complaint which the lower court had determined failed to make out a violation of the Act.

Nor is there any merit to the suggestion below that, if the NLRB deemed it appropriate to count the challenged ballots, it was incumbent upon the Board to have requested permission to do so through "a timely request for a remand." Pet. App. 27a. Such permission would be required only if the court of appeals' decision on the question of law that was presented to it "impliedly foreclose[s] the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." As *Broadcasting Co.* teaches, that is emphatically not the law.[7]

[7] The court of appeals' explanation for why a "request for a remand" is required reveals the depth of its misunderstanding of its role. That court stated: "When the Board makes a timely request for a remand to count disputed ballots, it enables *the court to inquire* in an orderly fashion into such relevant issues as the employee turnover that occurred at Lundy during the Board's delay." Pet. App. 27a (emphasis added). The very point of *Broad-*

Finally, the court of appeals was mistaken in its belief that the judicial function should be expanded in order to avoid "endless rounds of piecemeal litigation." Pet. App. 24a. *Broadcasting Co.* exposes the error in that approach:

> It is . . . urged upon us that if all matters of administrative discretion remain open for determination on remand after reversal, a succession of single determinations upon single legal issues is possible with resulting delay and hardship to the applicant. It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." [309 U.S. at 146]

D. What we have just shown establishes that, under settled principles of administrative law, the court of appeals exceeded the scope of its judicial review authority. But there is more: in so doing, that court exceeded its

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casting Co. and its progeny is that it is for the administrative agency—and *not* for the court—to decide in the first instance such policy questions as whether the passage of time makes it inappropriate to make decisions based upon challenged ballots.

Only if the Board were to determine, after counting the challenged ballots, to issue a certification of the Union as the bargaining representative and if that certification were to eventuate in a bargaining order which the Board sought to enforce would it then be appropriate for the court of appeals to determine whether the "delay" made enforcement inappropriate. That was the situation in *NLRB v. Long Island College Hospital*, 20 F.3d 76 (2d Cir. 1994), the case on which the Fourth Circuit relied. In *Long Island College Hospital* the NLRB had issued a certification and then, fourteen years later, the Board issued a bargaining order based upon that certification; when the NLRB petitioned to enforce its bargaining order, the court of appeals undertook to determine whether the extraordinary delay in that case made enforcement inappropriate.

jurisdiction under the particular NLRA provisions that govern here.

As we noted in stating the case, the NLRA provides for two separate types of legal proceedings: representation proceedings under § 9 ("R cases"), and unfair labor practice proceedings under § 10 ("C cases"). Final orders entered by the NLRB in the latter type of cases are expressly made reviewable in the courts of appeals by NLRA § 10(e) & (f). But § 9, "which is complete in itself, makes no provision, in terms, for review of a certification by the Board." *A.F. of L. v. Labor Board*, 308 U.S. 401, 406 (1940).[8]

From the very first days of the Act, this Court has recognized that the "statute on its face thus indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices." *A.F. of L.*, 308 U.S. at 409. Given that language, and what the "legislative history confirms," the "conclusion is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts." *Id.* at 409, 411.

Of course, where, as here, "an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit . . . the Act makes full provision for judicial review of the underlying certification" through review of the order in the unfair labor practice proceeding growing out of an NLRA § 8(a)(5) refusal-to-bargain complaint. *Boire v. Greyhound Corp.*, 376 U.S. 473, 477 (1964).

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[8] Rather than providing for direct review of certifications in R cases, NLRA § 9(d) provides that if, and only if, an order in an unfair labor practice case "is based in whole or in part upon facts certified" in a representation proceeding, the record of that proceeding "shall be included" in the record of the unfair labor practice case.

But a reviewing court's jurisdiction over the unfair labor practice proceeding does not generate any direct judicial authority over the conduct of the R case. That is the clear teaching of *Labor Board v. Falk Corp.*, 308 U.S. 453 (1940), which was decided along with *A.F. of L. v. Labor Board*.

In *Falk*, the NLRB had consolidated an unfair labor practice charge alleging that the employer in that case had "fostered and dominated a company union called the Independent Union" with a representation petition which a CIO-affiliated union had filed. 308 U.S. at 454. The Board sustained the unfair labor practice charge and ordered the employer to "disestablish" the Independent; the Board also directed an election and provided that the ballot would not include the Independent. On the Board's petition for enforcement pursuant to § 10, the court of appeals enforced the NLRB order in the unfair labor practice case but the court "attached a condition to the Board's order whereby Independent might become a candidate in the proposed election." *Id.* at 457. This Court reversed.

In the Court's view, although the C case and R case had been consolidated, each nonetheless remained a "distinct proceeding." 308 U.S. at 456. The "conditions attached by the court [of appeals] to the Board's order operated as a modification" of the direction of election in the R case proceeding. *Id.* at 458. That being so, the court of appeals exceeded its authority in imposing that condition since § 9 "vests power in the Board, not in the court, to select the method of determining what union, if any, employees desire as a bargaining agent," *id.*, and an appellate court "has no right to review a proposed election and in effect to supervise the manner in which it shall thereafter be conducted," *id.* at 459.

Falk is directly on point. As *Falk* makes clear, the unfair labor practice case and the representation case here were "distinct proceeding[s]." The court of appeals had

jurisdiction over the former, which provided the basis for reviewing determinations made in the R case *insofar as those determinations formed the predicate for the bargaining order in the unfair labor practice case*. But the appellate court's jurisdiction over the unfair labor practice case did not empower it to "select the method of determining what union, if any, employees desire." By precluding the NLRB from concluding the R case proceeding by counting the ballots of the very Lundy employees whom the court below held should have been included in the unit, the court of appeals exceeded its authority under the Act.[9]

E. One final point needs to be made. Although the target of the court of appeals' wrath was the National Labor Relations Board, the ultimate victims of that court's orders are the employees of Lundy and their right of self-determination protected by NLRA §§ 7 & 9. In its misguided attempt to censure the NLRB for having the temerity to proceed with the Board's own representation processes without first obtaining the court's leave, the Fourth Circuit has deprived the Lundy employees of their first right under the NLRA: the right to determine for themselves, through a secret ballot election, whether

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[9] The instant case is thus entirely different from *Service Employees Local 250 v. NLRB*, 640 F.2d 1042 (9th Cir. 1981) and *W.I. Miller Co. v. NLRB*, 988 F.2d 834 (8th Cir. 1993), on which the court of appeals relied. Both of those cases involved a single unfair labor practice case which was appealed to and decided by an appellate court; the question in both cases was whether, following the conclusion of the appellate court proceedings, the NLRB was free to adjudicate unfair labor practice claims that could have been but were not previously adjudicated (*Service Employees Local 250*) or to provide additional remedies for the unfair labor practices that the Board had found (*W.I. Miller Co.*). In each case, the court of appeals held that further NLRB proceedings in the unfair labor practice case were improper. In neither case, did the court of appeals claim to use its authority over an unfair labor practice case to control the NLRB's conduct of a distinct representation case.

they wish to deal with their employer through a collective representative.

That makes it all the more appropriate for this Court to undo what the Fourth Circuit has done, to set that court straight as to the scope of its authority, and to restore to the NLRB its authority to proceed with the representation case here in a manner consistent with the appropriate unit law as announced by the court of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the orders of the court of appeals precluding the Board from conducting further proceedings in the representation case should be reversed.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS INVOLVED

The National Labor Relations Act, as amended, 29 U.S.C. §§ 151 *et seq.*, provides in pertinent part as follows:

Section 8, 29 U.S.C. § 158. Unfair Labor practices

(a) It shall be an unfair labor practice for an employer—

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section [15]9(a) of this title.

* * * *

Section 9, 29 U.S.C. § 159. Representatives and elections

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof: . . .

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); * * *

* * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c), is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and

the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * *

Section 10, 29 U.S.C. § 160. Prevention of unfair labor practices

* * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

* * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file

its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *

No. 95-1790

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 204, AFL-CIO and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,

Petitioners,

v.

LUNDY PACKING COMPANY, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 95-1364

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 204, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,
Intervenors,

v.

LUNDY PACKING COMPANY,
Respondent.

Argued Sept. 28, 1995.

Decided Nov. 3, 1995.

Before WILKINSON, NIEMEYER, and HAMILTON, Circuit Judges.

Enforcement denied by published opinion. Judge WILKINSON wrote the opinion, in which Judge NIEMEYER and Judge HAMILTON joined.

OPINION

WILKINSON, Circuit Judge:

The National Labor Relations Board ("Board") seeks enforcement of its bargaining order against Lundy Packing Company, Inc. ("Lundy"). The principal basis for

Lundy's refusal to bargain is its contention that the Board improperly excluded certain quality control employees from a production and maintenance bargaining unit. We agree. The Board's bargaining unit determination both contravened its own announced standards and accorded controlling weight to the extent of union organization at Lundy, thereby violating § 9(c)(5) of the National Labor Relations Act. Accordingly, we deny the Board's petition for enforcement.

I.

Lundy operates a pork products plant in Clinton, North Carolina, which employs approximately 880 workers. On March 23, 1993, the United Food and Commercial Workers Union and the International Union of Operating Engineers filed a petition to jointly represent a group ("unit") of production and maintenance ("P & M") employees at Lundy's Clinton facility. Prior to this attempt, there was no history of bargaining here.

The composition of a bargaining unit is significant. Before a union can be certified as the representative of an employee unit, a majority of the unit's employees must vote for union representation. The predilections of employees are often revealed during early organizational efforts, and the inclusion or exclusion of certain employees may thus determine which party will prevail in a subsequent election. *See 1 The Developing Labor Law*, 378-80, 448 (Patrick Hardin, et al., eds., 3d ed.1992).

Here, Lundy and the Unions disagreed over the unit's composition. Lundy contended that a "wall-to-wall" unit (including all employees) was appropriate. The Unions' proposal, meanwhile, excluded approximately 213 employees, among them: drivers, waste management operators, garage employees, office clerical employees, process sales coordinators, hog buyers, quality control employees, and industrial engineers. Following a hearing, on May 7, 1993, the Acting Regional Director approved with some

additions the Unions' proposal for a less inclusive unit. On appeal, the Board directed that challenged ballots be cast by some of the excluded employees, including the electrician, the receiver, the industrial engineers ("IEs"), and the quality control employees (quality assurance/lab technicians and temporary management trainees ("QA/LTs") and lab technicians ("LTs")).

The election was held on June 3, 1993, with the Unions prevailing on a 318 to 309 vote (absent the 24 challenged and sealed ballots). After an investigation of the challenged ballots, the Regional Director ordered the opening and counting of the nine ballots cast by quality control employees, the three ballots cast by industrial engineers, and the two ballots cast by the waste management operator and receiver. The record does not reveal how the challenged votes might have affected the election outcome.

The Unions appealed this ruling to the Board. On September 2, 1994, the Board in a divided decision reversed the Regional Director, ordering that the challenged ballots for the QA/LTs, LTs, and IEs be disposed of and the Unions certified. Lundy subsequently refused to bargain with the Unions, precipitating an unfair labor charge and this appeal.

II.

Section 9(b) of the National Labor Relations Act grants to the Board the power to determine "the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b). We are mindful that the Board possesses broad discretion in determining the appropriate unit. *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 119 (4th Cir.1978). The Board's discretion reflects both its acknowledged expertise in such matters and its need for " 'flexibility in shaping the [bargaining] unit to the particular case.' " *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494, 105 S.Ct. 984, 987, 83 L.Ed.2d 986 (1985),

quoting NLRB v. Hearst Publications, Inc., 322 U.S. 111, 134, 64 S.Ct. 851, 862, 88 L.Ed. 1170 (1944).

Nonetheless, the Board must operate within statutory parameters. Section 9(c)(5) of the National Labor Relations Act states: "In determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159 (c)(5). This provision came in response to several Board "decisions where the unit determined could only be supported on the basis of the extent of organization." *Labor Board v. Metropolitan Ins. Co.*, 380 U.S. 438, 441, 85 S.Ct. 1061, 1063, 13 L.Ed.2d 951 (1965). While the operative concept "extent of organization" is not defined in the statute, it refers generally to "the groups of employees on which the union has focused its organizing efforts." 1 *The Developing Labor Law* at 452. Moreover, § 9(c)(5) does not merely preclude the Board from relying "only" on the extent of organization. The statutory language is more restrictive, prohibiting the Board from assigning this factor either exclusive or "controlling" weight. *See Arcadian Shores*, 580 F.2d at 120 (section 9(c)(5) prohibits "the extent of union organization [from being] the *dominant* factor in the Board's determination of the bargaining unit").

Heretofore the Board has generally avoided § 9(c)(5) violations by applying a multifactor analysis that was sufficiently independent of the extent of union organization—the so-called "community of interest" test. Several criteria, no one of which was more dominant than another, would determine whether employees shared a community of interest sufficient to form an appropriate unit:

> (1) similarity in the scale and manner of determining the earnings; (2) similarity in employment benefits, hours of work, and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills, and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization.

I.T.O. Corp. of Baltimore v. NLRB, 818 F.2d 1108, 1113 (4th Cir.1987), *quoting* R. Gorman, *Labor Law: Unionization and Collective Bargaining* 69 (1976).

Under this traditional method of analysis, the excluded quality control employees at Lundy appear to qualify for inclusion in the appropriate bargaining unit. The QA/LTs performed functions that were integral to the production process. In fact, they spent approximately 80 percent of their time on the production floor where they tested the cleanliness of the facility, obtained temperatures of hogs and products, and otherwise inspected the production line. The remaining 20 percent of their time was consumed in an office recording the results of their testing. The LTs spent about 15 percent of their time taking samples and 85 percent of their time performing tests in a laboratory. All these employees shared a great deal with the production and maintenance employees who were included in the Unions' proposed unit: (1) comparable wages; (2) identical benefits; (3) the performance of tasks essential to the production process; (4) similar educational backgrounds; (5) interaction on the production floor; (6) close physical proximity; (7) the same cafeteria, parking lot, break rooms, and locker room; and (8) similar performance evaluations.

The excluded quality control employees did differ in a few respects: (1) the method for calculating their earnings; (2) supervision; and (3) a lack of interchangeability with other P & M positions (other P & M employees did not perform the work of quality control

employees in their absence). Such differences, however, were not unique to the quality control employees. At least one P & M employee who was included in the bargaining unit had his pay calculated in the same manner as the excluded quality control employees, and dozens of other employees with different supervisors were included within the bargaining unit. The exclusion of quality control employees based on such meager differences is, to say the least, problematic under the "community of interest" standard, when such employees were engaged in tasks essential to the company's meat packing and processing operation.[1]

The Board, however, adopted a novel legal standard which effectively accomplished the exclusion. Under this new standard, any union-proposed unit is presumed appropriate unless an "overwhelming community of interest" exists between the excluded employees and the union-proposed unit: "Here, [the Board] find[s] . . . that the technicians do not share such an overwhelming community of interest with the petitioned-for production and maintenance employees as to mandate their inclusion in the unit despite the Petitioners' objections." *Lundy Packing Co., Inc.*, 314 N.L.R.B. 1042, 1043, 1994 WL 481361 (1994). By presuming the union-proposed unit

[1] While the industrial engineers ("IEs") were not as numerous, we agree with the dissenting Member, *see Lundy Packing Co., Inc.*, 314 N.L.R.B. 1042, 1046, 1994 WL 481361 (1994) (Member Stephens, dissenting), and the Regional Director that the IEs shared a community of interest with other P & M unit personnel. The IEs studied the efficiency of the production process, spending 50 percent of their time working on the production floor with P & M employees to reduce production costs. The IEs routinely spoke with P & M employees while performing their duties, had the same benefits and holidays, earned comparable wages, occasionally performed the work of other P & M employees, and had to meet no particular educational requirements. Further, there was no evidence that the basis for promotion was any different for IEs than for other P & M employees. Accordingly, it was error for the Board to exclude them from the P & M unit.

proper unless there is "an overwhelming community of interest" with excluded employees, the Board effectively accorded controlling weight to the extent of union organization. This is because "the union will propose the unit it has organized." *Laidlaw Waste Systems, Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir.1991); *see Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1093 (7th Cir.1984) ("the fact that [] the union wanted a smaller unit . . . could not justify the Board's certifying such a unit if it were otherwise inappropriate"). Given the community of interest between the included and excluded employees here, it is impossible to escape the conclusion that the QA/LTs' ballots were excluded "in large part because the Petitioners do not seek to represent them." *Lundy Packing*, 314 N.L.R.B. at 1046 (Member Stephens, dissenting). In fact, the Board has as much as admitted that it gave controlling weight to the Unions' proposal: "[A] unit including [quality control] employees might also have been an appropriate unit had such a unit been sought by the Petitioners." *Lundy Packing*, 314 N.L.R.B. at 1044.[2]

The Board's ruling thus exhibits the indicia of a classic § 9(c)(5) violation. The cases offered by the Board to support its holding, *Penn Color, Inc.*, 249 N.L.R.B. 1117, 1980 WL 11466 (1980), and *Beatrice Foods*, 222 N.L.R.B. 883, 1976 WL 7806 (1976), do not adopt or even reference the "overwhelming interest" test. Instead, it appears that the Board imported the "overwhelming interest" test from an entirely different area of labor law,

[2] While the Board points to the fact that the Acting Regional Director, early in this case, enlarged the unit beyond the Unions' initial request, we find this inapposite because the Unions did not appeal these early classifications to the Board. The sole question before the court is whether the Board gave controlling weight to union organization with regard to the exclusion of the QA/LTs, LTs, and IEs. The Acting Regional Director's determinations regarding *different* employees in no way insulated the Board from subsequent statutory violations when it decided whether an appropriate unit included the QA/LTs, LTs, and IEs.

accretion cases. In accretion cases, however, new employees are added to an existing bargaining unit *without* a representation election; therefore, the showing of shared characteristics must be higher to protect employee interests. *See, e.g., Westvaco, Va., Folding Box Div. v. NLRB*, 795 F.2d 1171, 1173 (4th Cir.1986). In accretion cases, the Board has indeed explained that new employees can be added to an existing bargaining unit "only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an *overwhelming community of interest* with the preexisting unit to which they are accreted." *Safeway Stores, Inc.*, 256 N.L.R.B. 918, 1981 WL 20532 (1981) (emphasis added). But this was not an accretion case, and the Board's transposition of the "overwhelming interest" standard runs afoul of § 9(c)(5).

III.

The statutory infirmity of the Board's holding is underscored when the Board's prior treatment of quality control personnel is examined. Heretofore, in an effort to avoid workplace fragmentation, the Board has consistently included quality control personnel in P & M units. *Bennett Industries, Inc.*, 313 N.L.R.B. 1363, 1364, 1994 WL 673754 (1994) (quality control employees included within P & M unit by Regional Director because they "perform a function which is an extension of and integrated with the manufacturing process and work in close proximity to undisputed unit employees"); *Virginia Mfg. Co., Inc.*, 311 N.L.R.B. 992, 994, 1993 WL 193727 (1993) (quality control employee included within P & M unit because he spent 20 percent of his time on the production floor and had contact with unit employees); *Hogan Mfg., Inc.*, 305 N.L.R.B. 806, 807, 1991 WL 263214 (1991) (quality control employee included within P & M unit because "quality control is a vital part of the production process"); *Blue Grass Industries, Inc.*,

287 N.L.R.B. 274, 299, 1987 WL 90121 (1987) (quality control employees included within P & M unit because they are an "integral part of the overall manufacturing process"); *SCM Corp.*, 270 N.L.R.B. 885, 886, 1984 WL 36459 (1984) (quality control employee included within P & M unit because he receives comparable benefits and has "regular work-related contact with other unit employees"); *Libbey Glass Division*, 211 N.L.R.B. 939, 941, 1974 WL 5114 (1974) (quality control employees included within P & M unit because "it is clear these employees have substantial contact with production and maintenance employees in performing their inspection functions, and their duties are an integral part of the Employer's overall glass manufacturing process"); *Ambrosia Chocolate*, 202 N.L.R.B. 788, 789, 1973 WL 12216 (1973) (quality control employees included within P & M unit because they share the same lunchroom, locker room, parking lot, holidays, and benefits, thereby creating "sufficient common interests").

The Board's rationale thus seemed clear: quality control employees were integrally related to the production process and typically shared important characteristics with other P & M employees. Indeed, P & M unit representation of quality control employees appeared to be routine. The Board had included quality control workers in P & M units under quite divergent circumstances: (1) cases in which the union sought to exclude all quality control personnel, *see, e.g., Ambrosia Chocolate*, 202 N.L.R.B. at 788; (2) cases in which the union sought to include all quality control personnel, *see, e.g., Libbey Glass Division*, 211 N.L.R.B. at 939; and (3) cases in which a party sought to exclude some quality control employees from a unit that represented other quality control personnel, *see, e.g., Virginia Mfg.*, 311 N.L.R.B. at 994. Even the United Food and Commercial Workers International Union, one of the unions objecting to the inclusion of quality control employees here, represents quality control workers at another North Carolina food plant, Equity Group.

The Board can point to only two cases in which quality control employees were excluded from a P & M unit, and both are easily distinguishable. In *Penn Color,* 249 N.L.R.B. at 1120, quality control employees had a different basis for promotion, different educational requirements, and there was no evidence of substantial contract with other P & M employees. Quality control personnel were similarly isolated in *Beatrice Foods,* 222 N.L.R.B. 883, 1976 WL 7806 (1976), where they worked in a laboratory and did not have regular contract with other P & M employees. At Lundy, in contrast, quality control employees often worked on the production floor, shared a similar basis for the evaluation of their work, had regular contact with other P & M employees, and faced no special academic requirements. In short, Lundy's quality control employees were integrated into the production process, while those at Penn Color and Beatrice Foods were not.

Whatever the Board's chosen criteria for decision, they must be applied consistently. "[W]hen the Board adopts a policy to guide it in the exercise of its discretion, the original very broad discretion is to some extent narrowed, and subsequent decisions must be reasonably consistent with the expressed policy." *Westvaco,* 795 F.2d at 1173, *quoting Consolidated Papers, Inc. v. NLRB,* 670 F.2d 754, 757 (7th Cir.1982). Courts have insisted "that the Board apply with reasonable consistency whatever standard it adopts to guide the exercise of its delegated power." *Continental Web Press,* 742 F.2d at 1089. While the Board may choose to "depart from established policy, it must explicitly announce the change and its reasons for the change." *Westvaco,* 795 F.2d at 1173, *quoting Consolidated Papers,* 670 F.2d at 757. In *Continental Web Press,* for example, the Board had deviated from a policy of including certain employees in a bargaining unit without explaining "why a unit that it had again and again found to be homogenous should be broken into subunits." 742 F.2d at 1094.

The court denied enforcement, explaining that while "[t]he Board is allowed to reverse course . . . it has got to give reasons, or else the reversal is arbitrary." *Id.* at 1093 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). Here, the Board gave insufficient reasons for its change of course and switch of standards.

We recognize that bargaining unit cases are fact-sensitive and that decisional law will seldom travel a straight-line course. Nonetheless, the significance of neutral rationales for inclusion or exclusion of particular employees in collective bargaining units cannot be overstated. Otherwise, reviewing courts will have no means of enforcing § 9(c)(5)'s prohibition; the Board can selectively rely on differences when the union desires exclusion of employees—and on similarities when the union desires inclusion. *See* Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review,* 75 B.U.L.Rev. 387 (1995). The deference owed the Board as the primary guardian of the bargaining process is well established. It will not extend, however, to the point where the boundaries of the Act are plainly breached.

IV.

We do not reach respondent's other assignments of error. For the foregoing reasons, we deny enforcement of the Board's order.

ENFORCEMENT DENIED.

APPENDIX B

[Filed January 2, 1996]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1364
12-CA-16618

NATIONAL LABOR RELATIONS BOARD;
Petitioner,

UNITED FOOD & COMMERCIAL WORKERS, Local 204, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, Local 465, AFL-CIO,
Intervenors,

v.

LUNDY PACKING COMPANY,
Respondent.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The intervenors' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX C

Filed January 10, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1364
12-CA-16618

NLRB

v.

LUNDY PACKING CO.

MANDATE

The judgment of this Court dated 11/3/95 takes effect today.

BERT M. MONTAGUE
Clerk

APPENDIX D

Clinton, NC

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 12-CA-16618
(Formerly 11-CA-16222)

THE LUNDY PACKING COMPANY, INC.

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 204, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO

ORDER REMANDING PROCEEDING TO REGIONAL DIRECTOR

On December 30, 1994, the National Labor Relations Board issued a Decision and Order[1] finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, and ordered that Respondent cease and desist therefrom and take certain affirmative action to remedy such unfair labor practices.

Thereafter, the Board sought enforcement of its bargaining order with the United States Court of Appeals

[1] 310 NLRB No. 1959 (1994). Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570 by reference to volume and pamphlet number.

for the Fourth Circuit. On November 3, 1995, the court denied enforcement of the Board's order on the ground that the certified unit was not appropriate. On January 2, 1996, the court denied the Intervenors' petition for rehearing with suggestion for rehearing in banc.

The Board, having reviewed the record in light of the court's opinion, finds it necessary to remand the proceeding to the Regional Director to dispose of the challenged ballots in the related representation proceeding, Case 12-RC-7606. Accordingly,

IT IS ORDERED that the proceeding is remanded to the Regional Director for Region 12 for further appropriate action.

Dated, Washington, D.C., February 6, 1996.

By direction of the Board:

ENID W. WEBER
Associate Executive Secretary

APPENDIX E

[NLRB Logo]

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

FEBRUARY 9, 1996

THE LUNDY PACKING COMPANY, INC., CASE 12-CA-16618.

RESPONDENT'S MOTION FOR STAY OF THE BOARD'S FEBRUARY 6, 1996 ORDER REMANDING THE PROCEEDING TO THE REGIONAL DIRECTOR TO DISPOSE OF THE CHALLENGED BALLOTS IN CASE 12-RC-7606 IS DENIED. ALTHOUGH THE BOARD'S ORDER INDICATED THAT THE BOARD WAS REMANDING THE REFUSAL-TO-BARGAIN PROCEEDING IN CASE 12-CA-16618 TO THE REGIONAL DIRECTOR, RATHER THAN THE UNDERLYING REPRESENTATION PROCEEDING IN CASE 12-RC-7606, THIS WAS INADVERTENT. A CORRECTED ORDER IS BEING ISSUED THIS SAME DATE. THE BOARD HAS ACCEPTED THE COURT'S DENIAL OF ENFORCEMENT OF THE BOARD'S BARGAINING ORDER IN CASE 12-CA-16618. THE BOARD RETAINS JURISDICTION, HOWEVER, IN THE REPRESENTATION CASE AND IT IS THAT PROCEEDING WHICH THE BOARD HAS REMANDED TO THE REGIONAL DIRECTOR FOR FURTHER APPROPRIATE ACTION. BY DIRECTION OF THE BOARD:

JOHN J. TONER
Executive Secretary

cc: NLRB—Region 12
Robert A. Valois, Esq.
Peter J. Ford, Esq.
Richard F. Griffin, Jr., Esq.

Clinton, NC

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 12-RC-7606

THE LUNDY PACKING COMPANY, INC.

and

UNITED FOOD AND COMMERICAL WORKERS UNION, LOCAL 204, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO

ORDER REMANDING PROCEEDING TO REGIONAL DIRECTOR

On December 30, 1994, the National Labor Relations Board issued a Decision and Order in Case 12-CA-16618[1] finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, and ordered that Respondent cease and desist therefrom and take certain affirmative action to remedy such unfair labor practices.

Thereafter, the Board sought enforcement of its bargaining order with the United States Court of Appeals for the Fourth Circuit. On November 3, 1995, the court denied enforcement of the Board's order on the ground that the certified unit was not appropriate. On January

[1] 310 NLRB No. 1959 (1994). Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570 by reference to volume and pamphlet number.

2, 1996, the court denied the Intervenors' petition for rehearing with suggestion for rehearing in banc.

The Board, having reviewed the record in light of the court's opinion, finds it necessary to remand the representation proceeding to the Regional Director to dispose of the challenged ballots in Case 12-RC-7606.

IT IS ORDERED that the proceeding is remanded to the Regional Director for Region 12 for further appropriate action.

Dated, Washington, D.C., February 6, 1996.

By direction of the Board:

ENID W. WEBER
Associate Executive Secretary

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 12

Case 12-RC-7606

THE LUNDY PACKING COMPANY, INC.,
Employer

and

UNITED FOOD AND COMMERICAL WORKERS UNION, LOCAL 204, AFL-CIO and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,
Joint Petitioners

ORDER DIRECTING OPENING OF CHALLENGED BALLOTS AND ISSUANCE OF REVISED TALLY OF BALLOTS

On November 3, 1995, the United States Court of Appeals for the Fourth Circuit denied enforcement of the National Labor Relations Board's Decision and Order in Case 12-CA-16618 (formerly 11-CA-16222)—315 NLRB No. 159 (1994), on the ground that the Board had improperly reversed the former Regional Director's determination as to certain challenged ballots in the related representation proceeding, Case 12-RC-7606. Thereafter, the Board, by its Associate Executive Secretary, on February 6, 1996, issued an Order Remanding Proceeding to Regional Director, and on February 9, 1996, issued a Corrected Order, for the purpose of disposing of the challenged ballots in the aforementioned representation proceeding.

Consistent with the Court's opinion, the job classifications of quality assurance/lab technicians, temporary management trainees I, lab technicians, industrial engineers, and industrial engineer trainees, are to be included in the appropriate bargaining unit. Thus, in accordance with the former Regional Director's determination, the ballots of Sandy Hall, Ronnie Johnson, Kenneth Parker, Karen Autry, Jimmy Tyndall, Leroy Wooten, Emily Brunson, Carlton Honeycutt, Louise Preddy, Sharon Williams, Relmon Fann, and Aundria Grady shall be opened and counted. In addition, the job classifications of finished product loader/cleaner and waste management operator having been previously found to be appropriately included in the bargaining unit, and no issue thereon having been raised before the Court, the challenges to the ballots of Charles Carter and Lynwood E. Stanley shall be opened and counted, in accordance with the former Regional Director's determination.

ACCORDINGLY, IT IS HEREBY DIRECTED that the challenged ballots cast by *Sandy Hall, Ronnie Johnson, Kenneth Parker, Karen Autry, Jimmy Tyndall, Leroy Wooten, Emily Brunson, Carlton Honeycutt, Louise Preddy, Sharon Williams, Relmon Fann, Aundria Grady, Charles Carter,* and *Lynwood E. Stanley* be opened and counted, and a revised tally of ballots issued in accordance with the results shown.

THEREFORE, PLEASE TAKE NOTICE that on the 16th day of February, 1996, at 11:00 a.m. in the National Labor Relations Board Hearing Room, 201 E. Kennedy Boulevard, Suite 530, Tampa, Florida, the aforementioned challenged ballots will be opened and counted by a designated Board agent, at which time each party shall have the right to be present.[1]

[1] This Order is limited to the challenged ballots covered herein and is not to be read as dealing with and/or disposing of the remaining challenged ballots covered in the former Regional Director's Supplemental Decision. Any necessary and appropriate action concerning these remaining challenged ballots is reserved for a time following the count directed herein. Thus, the revised tally will reflect that said 10 challenged ballots are still pending disposition.

DATED at Tampa, Florida this 9th day of February, 1996.

/s/ Rochelle Kentov
ROCHELLE KENTOV
Regional Director
National Labor Relations Board
Region 12
201 E. Kennedy Boulevard, Suite 530
Tampa, FL 33602-5824

APPENDIX G

Filed: February 15, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1364
(12-CA-16618)

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 204, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,
Intervenors,

versus

LUNDY PACKING COMPANY,
Respondent.

No. 96-1177
12-CA-16618

IN RE: LUNDY PACKING COMPANY, INCORPORATED,
Petitioner.

ORDER

In *N.L.R.B. v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), this court addressed the Board's bargaining unit determination for a production and maintenance unit at Lundy Packing Company's Clinton, North Carolina facility. In that case, we denied the Board's request to enforce its bargaining order against Lundy, thereby terminating all administrative proceedings relating to the case. At no time did the Board ever suggest that a remand for counting the challenged ballots would be an appropriate alternative disposition of the case (the Board unequivocally requested "that judgment should enter enforcing the Board's order in full"), nor, given our view of the proceedings below, did this court remand any portion of the case to the Board for further consideration.

"Absent a remand, the Board may neither reopen nor make additional rulings on a case once exclusive jurisdiction vests in the reviewing court." *George Banta Co., Inc. v. N.L.R.B.*, 686 F.2d 10, 16 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). This is because "[i]n section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), Congress provided that '[u]pon the filing of the record with [the Court of Appeals] the jurisdiction of the court shall be exclusive and its judgment and decree shall be final.'" *Service Emp. Intern. Union Local 250, AFL-CIO v. N.L.R.B.*, 640 F.2d 1042, 1044 (9th Cir. 1981) (Kennedy, J.). As the Supreme Court has noted, when a "proceeding has ended and has been merged in a decree of a court pursuant to the directions of the National Labor Relations Act . . . . [i]t is to have all the qualities of any other decree entered in a litigated cause upon full hearing, and is subject to review by this court on certiorari as in other cases." *Int'l Union of Mine, Mill & Smelter Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339 (1945).

In *Lundy*, this court addressed both the refusal of Lundy Packing to bargain and the underlying representation proceedings. Indeed, the refusal to bargain case was

merely the vehicle by which the Board's representation proceedings reached this court for review. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477 (1964) ("Such decisions, rather, are normally reviewable only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed as, for example, where an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit"); *The Developing Labor Law* at 1878 (Hardin, ed. 1992) ("review of issues in representation proceedings may only be obtained incidental to review of an order entered in an unfair labor practice proceeding"). The Board acknowledged as much in its *Lundy* brief, listing only two "determinative underlying issues": "(1) whether the Board abused its broad discretion in finding appropriate a production and maintenance unit . . . and (2) whether the Board abused its discretion in overruling the Company's election objections."

Thus, the attempt by the Board to revive the representation petition and the election that followed exceeds the Board's jurisdiction. Following our decision in *Lundy*, "[t]he Board had no jurisdiction to modify the remedy." *W.L. Miller Co. v. N.L.R.B.*, 988 F.2d 834, 837 (8th Cir. 1993). Indeed, any other approach would result in endless rounds of piecemeal litigation and frustrate the ability of the Supreme Court to review final decisions of this court.

Our respect for the Board is such that we see no need to mandamus or otherwise enjoin it. Therefore, Lundy's motion to stay the Board's order is moot, its motion for a writ of mandamus is denied, its motion to show cause why the Board should not be held in contempt is denied, and the unions' motion to intervene is granted. We reiterate our earlier order that enforcement of the Board's bargaining order is denied and that this case is closed in all respects.

Entered at the direction of Chief Judge Wilkinson with the concurrence of Judge Niemeyer and Judge Hamilton.

For the Court

/s/ Bert M. Montague
Clerk

APPENDIX H

FILED: March 21, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1364(L)
(12-CA-16618)

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 204, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,
Intervenors,

versus

LUNDY PACKING COMPANY,
Respondent.

No. 96-1177
12-CA-16618

IN RE: LUNDY PACKING COMPANY, INCORPORATED,
Petitioner.

ORDER

Numerous problems inhered in the conduct of this particular election: (1) the manner in which two separate representation campaigns were consolidated; (2) the determination of the bargaining unit; (3) the evidence of election misconduct (electioneering, intimidation, and the failure to accommodate Spanish-speaking voters); and (4) the Board's unexplained delay in issuing its decision on the challenged ballots. As a result, in *N.L.R.B. v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), this court denied enforcement of the Board's bargaining order *outright*, disposing of the petition on the basis of the Board's improper bargaining unit determination.

While the Board contends that our decision constituted some sort of remand, nowhere in our opinion did we so indicate. Moreover, given that the Board did not request or even suggest a remand in its initial submissions to this court, it is unusual that the Board would have interpreted our disposition as implicitly providing such a remedy. And if the Board possessed legitimate questions about the outcome of this case, those questions should have been raised in a timely petition for rehearing. Yet the Board did not file such a petition for rehearing.

When the Board makes a timely request for a remand to count disputed ballots, it enables the court to inquire in an orderly fashion into such relevant issues as the employee turnover that occurred at Lundy during the Board's delay. *See N.L.R.B. v. Long Island College Hospital*, 20 F.3d 76, 83 (2nd Cir. 1994) ("Because of the great delay, the extraordinary Board and employee turnover . . . and the fact that the majority of the present employees did not vote in the relevant election, this case presents unique circumstances that warrant denial of enforcement of the bargaining order"). Instead, the Board acted in clear contravention of its jurisdictional limits and sought to bypass this court. While the Board calls our attention to an order issued in *BB&L, Inc. v. N.L.R.B.* (93-1479) (D.C. Cir. 1995), there, the Board

requested a remand in a timely petition for rehearing, and the court saw fit to enter an order prescribing that a particular ballot be counted. Hence, the Board's actions in *BB&L, Inc.* were pursuant to a properly obtained court order. Here, in contrast, the Board did not even request a remand and simply proceeded to conduct further proceedings on its own initiative. As we explained in our order of February 15, 1996, the Board had no such authority.

The court reiterates its respect for the Board's role in the area of national labor relations law. The court expects in turn respect for the its [*sic*] process and its mandates. The court denies the motion for reconsideration of its order of February 15.

Entered at the direction of Chief Judge Wilkinson, with the concurrence of Judge Niemeyer and Judge Hamilton.

For the Court

/s/ Bert M. Montague
Clerk

APPENDIX I

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 12-CA-16618
(formerly 11-CA-16222)

THE LUNDY PACKING COMPANY, INC. and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 204, AFL-CIO, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO

December 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND
MEMBERS STEPHENS AND TRUESDALE

On October 19, 1994, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the request of the United Food and Commercial Workers Union, Local 204, AFL-CIO, and International Union of Operating Engineers, Local 465, AFL-CIO (the Unions) to bargain following the Unions' certification in Case 12-RC-7606. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On November 14, 1994, the General Counsel filed a Motion for Summary Judgment. On November 17, 1994, the Board issued an order transferring the proceeding to

the Board and a Notice to Show Cause why the motion should not be granted. On December 14, 1994, the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and its response to the notice to show cause, the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of its objections to the election, the Board's unit determination, the failure of the Board to dismiss the petition for a lack of showing of interest, the excessive turnover in the bargaining unit during the period of time prior to the issuance of the Board's decision, and for all of the other reasons advanced during the underlying representation proceeding in Case 12-RC-7606.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. *See Pittsburg Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, The Lundy Packing Company, Inc., a North Carolina corporation, with an office and place of business in Clinton, North Carolina, has been engaged in

the processing and sale of pork and pork products. During the 12 months preceding issuance of the complaint, the Respondent, in conducting its business operations, purchased and received at its Clinton, North Carolina facility goods valued in excess of $50,000 directly from points located outside the State of North Carolina. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held June 3, 1993, the Unions were certified on September 2, 1994,[3] as the collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees, janitorial employees, condensate drivers, waste management operators, raw material handler/cleaners, stockers, emergency room technicians, first aid attendants, kill gang leaders, and plant clericals, including inventory control section leaders, office clerks B & C (inventory control), distribution service section leaders, office supplies section leaders, and office clerks A, B & C (supplies/distribution) employed by the Employer at its Clinton, North Carolina facility, but excluding long-haul drivers, co-drivers, short-haul drivers, sales route drivers, permanent livestock drivers, temporary livestock drivers, outside buyers, hog buyers, assistant hog buyers, assistant hog buyers p.m., tire changers, vehicle mechanics, vehicle refrigeration mechanics, laborers (garage a.m. and p.m.), industrial engineers, industrial engineer trainees, laboratory technicians, quality assurance technicians, temporary management trainees I, process

[3] 314 NLRB 1042.

sales coordinators, trip audit entry section leaders, office clericals, confidential employees, guards and supervisors as defined in the Act.

The Unions continue to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since September 7, 1994, the Unions have requested the Respondent to bargain, and, since September 7, 1994, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after September 7, 1994, to bargain with the Unions as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Unions, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Unions. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, The Lundy Packing Company, Inc., Clinton, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food and Commercial Workers Union, Local 204, AFL-CIO, and International Union of Operating Engineers, Local 465, AFL-CIO, as the exclusive bargaining representative of the employees in the following bargaining unit:

> All production and maintenance employees, janitorial employees, condensate drivers, waste management operators, raw material handlers/cleaners, stockers, emergency room technicians, first aid attendants, kill gang leaders, and plant clericals, including inventory control section leaders, office clerks B & C (inventory control), distribution service section leaders, office supplies section leaders, and office clerks A, B & C (supplies/distribution) employed by the Employer at its Clinton, North Carolina facility, but excluding long-haul drivers, co-drivers, short-haul drivers, sales route drivers, permanent livestock drivers, temporary livestock drivers, outside buyers, hog buyers, assistant hog buyers, assistant hog buyers p.m., tire changers, vehicle mechanics, vehicle refrigeration mechanics, laborers (garage a.m. and p.m.), industrial engineers, industrial engineer trainees, laboratory technicians, quality assurance technicians, temporary management trainees I, process sales coordinators, trip audit entry section leaders, office clericals, confidential employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Unions as the exclusive representative of the employees in the unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Post at its facility in Clinton, North Carolina, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 12 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. December 30, 1994

William B. Gould IV,	Chairman
James M. Stephens,	Member
John C. Truesdale,	Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Food and Commercial Workers Union, Local 204, AFL-CIO, and International Union of Operating Engineers, Local 465, AFL-CIO as the exclusive representative of the employees in the following bargaining unit:

> All production and maintenance employees, janitorial employees, condensate drivers, waste management operators, raw material handler/cleaners, stockers, emergency room technicians, first aid attendants, kill gang leaders, and plant clericals, including inventory control section leaders, office clerks B & C (inventory control), distribution service section leaders, office supplies section leaders, and office clerks A, B & C (supplies/distribution) employed by us at our Clinton, North Carolina facility, but excluding long-haul drivers, co-drivers, short-haul drivers, sales route drivers, permanent livestock drivers, temporary livestock drivers, outside buyers, hog buyers, assistant hog buyers, assistant hog buyers p.m., tire changers, vehicle mechanics, vehicle refrigeration mechanics, laborers (garage a.m. and p.m.), industrial engineers, industrial engineer trainees, laboratory technicians, quality assurance technicians, temporary management trainees I, process sales coordinators, trip audit entry section leaders, office clericals, confidential employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Unions and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

THE LUNDY PACKING COMPANY, INC.

APPENDIX J

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 12-RC-7606

THE LUNDY PACKING COMPANY, INC. and UNITED FOOD AND COMMERICAL WORKERS UNION, LOCAL 204, AFL-CIO, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,

Joint Petitioners.

September 2, 1994

DECISION ON REVIEW, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN GOULD AND
MEMBERS STEPHENS AND DEVANEY

On May 7, 1993, the Acting Regional Director for Region 12 issued a Decision and Direction of Election in which he directed an election in the petitioned-for unit of production and maintenance employees, excluding, inter alia, quality assurance/lab technicians and management trainees I, lab technicians, and industrial engineers. The Joint Petitioners and the Employer filed timely requests for review. By Order dated June 3, 1993, the Board majority [1] denied both requests for review but permitted the electrician A at the Employer's Gold Banner facility, the receiver, industrial engineers, quality assurance/lab technicians, temporary management trainees I, and lab tech-

[1] Then-Chairman Stephens and Member Devaney; former-Member Raudabaugh dissenting in part on other grounds.

nicians to vote by challenged ballot. The election was conducted on June 3, 1993; the tally of ballots showed 318 votes for Joint Petitioner and 309 against, with 24 determinative challenged ballots. Thereafter, the Employer filed timely objections to the election.

On July 29, 1993, after an investigation, the Regional Director issued a Supplemental Decision on Challenged Ballots and Objections to Election, and Order. The Regional Director overruled the challenges to the ballots cast by the quality assurance/lab technicians, temporary management trainees I, lab technicians, industrial engineers, waste management operator, and receiver, and included them in the unit.[2] The Joint Petitioners filed a timely request for review of the Regional Director's decision, arguing that these classifications should be excluded from the unit. The Employer filed a statement in opposition to the Joint Petitioners' request for review, and a motion to strike the request for review.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record,[4] we have decided to: (1) grant Joint Petitioners' request for review with respect to the Regional Director's finding that the petitioned-for unit of production and maintenance employees also must include the quality assurance/lab technicians, temporary management trainees I, lab technicians, and industrial engineers and, on review, reverse

[2] The Regional Director also overruled challenges to the ballots cast by the finished product loader/cleaner, and sustained challenges to the ballots of the electrician A and employees McPhail, Valente, and Bradshaw. He further directed that the eligibility of certain alleged discriminatees be determined in the pending unfair labor practice proceeding. No request for review was filed with regard to these rulings.

[3] The Employer's motion to strike is denied.

[4] See Sec. 102.67(d) of the Board's Rules (the Board may, in its discretion, examine the record in evaluating a request for review).

the Regional Director's decision overruling the challenges to their ballots; (2) deny the Joint Petitioners' request for review of the Regional Director's decision overruling the challenge to the ballot of the waste management operator and deny the Employer's request for review of the Regional Director's overruling of the Employer's objections to the election for the reasons stated in his supplemental decision; and (3) find it unnecessary to resolve the challenge to the ballot cast by the receiver because, in view of the above determinations, his ballot no longer is determinative of the election results.

The Employer is engaged in the processing and sale of pork and pork products at its Clinton, North Carolina facility. The Employer's facility consists of two plants: the first contains the processing and shipping areas; the second contains the kill and cut areas. The two plants are connected via a tunnel where the pork products from plant two are conveyed to plant one for further processing and shipment. A hog barn, where hogs are housed for slaughter, adjoins plant two. A separate garage building is physically located between the two plant buildings, and the waste water treatment plant and warehouse are located behind the hog barn. All employees enjoy the same benefits and all are subject to drug testing and to the Employer's rules and employee handbook. There are no specific plantwide shifts; each department sets it own shifts.

Placement of the Quality Assurance/Lab Technicians, Temporary Management Trainees I, Lab Technicians, and Management Trainees

Quality assurance/lab technicians and temporary management trainees I spend approximately 80 percent of their time on the production floor taking a variety of samples of the working surfaces to which the product will be exposed, testing the housekeeping and cleanliness of the facility, performing inspections, and obtaining weights and temperature of hogs and products. The remaining 20

percent of their time is spent recording the results of their inspections in the office. Lab technicians (a classification separate from that of quality assurance/lab technicians) spend approximately 85 percent of their time in the laboratory doing tests, and the remainder working around the production areas gathering samples. They also prepare paperwork documenting test results. Production and maintenance employees perform the same type of checks on meat as do the quality assurance/lab technicians, temporary management trainees I, and lab technicians; all fill out the same reports.

Quality assurance/lab technicians, temporary management trainees I, and lab technicians (collectively referred to as technicians) are paid on a coefficient basis, which is not an hourly basis, and record their time on a timesheet. In contrast, production and maintenance employees are hourly paid and punch a timeclock. Technicians do not interchange with production and maintenance employees. Technicians are supervised by the quality assurance/lab manager, under the direction of the research and development director. With respect to transfers, five of the seven current quality assurance/lab technicians and temporary management trainees I transferred directly from production positions, and one transferred from an office position. Technicians are not required to have a college education or technical education. Employees take a math or aptitude test when transferring to a quality-control position. Four employees stated that when they transferred from production to quality assurance/lab technician positions, they received 6 months of on-the-job training. The lab technicians had been assigned to clerical positions before being placed in the lab technician classification; one has an associate degree in accounting, and the other has no education beyond high school. Lab technicians receive several weeks of on-the-job training. Quality assurance/lab technicians and temporary management trainees I are cross-trained and substitute for lab technicians when the lab technicians are absent.

A petitioned-for unit need only be *an* appropriate unit for purposes of collective bargaining, not the most appropriate unit,[5] and in representation proceedings, the unit sought by the petitioner is always a relevant consideration.[6] Here, we find, contrary to the Regional Director, that the technicians do not share such an overwhelming community of interest with the petitioned-for production and maintenance employees as to mandate their inclusion in the unit despite the Petitioners' objections. The technicians are separately supervised, are paid differently than the petitioned-for employees, and interchange with each other but not with production and maintenance employees. Although technicians do perform some of the same function as performed by the petitioned-for employees, the majority of their functions, albeit related to the production process, are generally different from those performed by production and maintenance employees. In addition, although there is some contact between technicians and the petitioned-for employees, this contact is not so substantial and regular as to compel their inclusion in the unit.

In *Penn Color*,[7] the Board found appropriate the petitioned-for unit of production and maintenance employees, excluding quality control and development technicians. There, despite common vacation policies, holidays, pension plans, sick days, and "some" contact, the Board found that in view of the their separate supervision, absence of interchange, option of being paid on a salaried basis, and different requirements regarding educational background and on-the-job training, as well as the fact that the petitioner did not seek to include them in the unit, the quality control and research and development technicians' community of interest with production and maintenance employees was not sufficient to warrant

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[5] *Omni International Hotel*, 283 NLRB 475 (1987).

[6] *E. H. Koester Bakery & Co.*, 136 NLRB 1006 (1962).

[7] 249 NLRB 1117 (1980).

including them in the unit. In *Beatrice Foods,*[8] the Board sustained challenges to the ballots of quality control employees, despite the petitioner's urgings that those ballots be counted. The Board found that as they were separately supervised, separately located, and did not have regular contact with production employees, quality control employees did not share a sufficient community of interest with unit employees to enable them to be included in the unit.[9]

We are not unmindful that the Board has generally included quality control employees in production and maintenance units when a union has requested them, finding that their placement in the same unit does not create a conflict of interest.[10] Here, there are factors

[8] 222 NLRB 883 (1976).

[9] *Kellogg Switchboard & Supply Co.*, 127 NLRB 64 (1960), and *W. R. Grace & Co.*, 202 NLRB 788 (1973), in which the Board included quality control employees over the petitioners' objections, were decided prior to the Board's decision in *Penn Color* and, therefore, have diminished precedential value. Moreover, both cases are distinguishable. In *Kellogg*, the Board simply concluded, with almost no explication, that the interests of the sole quality control technician were not sufficiently dissimilar from those of production and maintenance employees to justify his exclusion. In *W. R. Grace & Co.*, the Board overruled challenges to the ballots of quality control employees in view of their numerous contacts with unit employees and their integral role in the production process, and the fact that they were hourly paid, shared the same work breaks, lunch periods, and locker room with unit employees, punched a timeclock, received similar benefits, and had similar training. In *Blue Grass Industries*, 287 NLRB 274, 276-277 (1987), decided after *Penn Color*, the Board found that the circumstances compelled the inclusion of quality control inspectors in the unit of production employees. The Board found that their jobs were a vital part of the production plant, their pay and benefits were similar, and that there was significant interaction between the two groups of employees.

[10] See *Blue Grass Industries*, supra; *W. R. Grace & Co.*, supra. In *Blue Grass*, the administrative law judge noted that "[a]lthough the important criterion is community of interest with bargaining

present that would support adding the disputed employees to the petitioner-for unit, i.e., they perform production-related functions, have some contact with unit employees, have similar benefits and holidays, are not required to have special education or training, and some were formerly employed in production positions. Consequently, a unit including these employees might also have been an appropriate unit had such a unit been sought by the Petitioners. However, because, as previously stated, the disputed employees have separate supervision, are paid differently, do not interchange with the production and maintenance employees, have generally different functions, and have insubstantial and irregular contact with the requested production and maintenance employees, and as no labor organization is seeking to represent a broader unit including the disputed employees, we conclude that the quality assurance/lab technicians, temporary management trainees I, and lab technicians do not share such an overwhelming community of interest as to require their inclusion in the petitioned-for production and maintenance unit. *Penn Color*, supra.[11]

unit members rather than the relationship of the job to the production process . . . the importance of quality control jobs in the production of garments is a further consideration when a community of interest has already been demonstrated." 287 NLRB at 299.

[11] By stating that we made our decision "in large part because the Petitioner does not seek to represent [the disputed employees]," our dissenting colleague is implying that we have given "controlling" weight to the Union's extent of organization, which is prohibited by Sec. 9(c)(5) of the Act. However, as is clear from the above, "the appropriateness of the proposed unit . . . is indicated by other clear and decisive factors, [and] there is no reason why the Union's decision to seek representation of employees on a narrower basis[] should preclude the Board from finding the smaller unit appropriate." *E. H. Koester Bakery Co.*, supra at 1012 fn. 16 (internal quotation marks omitted).

Industrial Engineer and Industrial Engineer Trainees

The Employer's one industrial engineer and two industrial engineer trainees (collectively referred to as industrial engineers) do timestudies. In performing their timestudies, industrial engineers observe production employees, record the time it takes them to perform production functions, and make calculations to obtain standards for classification and products. They also prepare layouts for new departments and/or new functions. While on the production floor, industrial engineers speak with production employees inquiring about any changes in their jobs since the prior audit, and eliciting any recommendations regarding the flow of the jobs. Industrial engineers spend half of their time in their office, located away from the production floor, and the other half in and around the production areas obtaining data. Although the data they generate affects the amount of wages and incentive pay received by production employees, industrial engineers make no recommendations regarding whether the standards calculated should result in a pay increase or incentive pay.

Industrial engineers are under the supervision of the senior and chief industrial engineers, who in turn report to the director of research and development. None of these three supervisors or managers supervise any production and maintenance employees. There are no education or technical prerequisites for becoming an industrial engineer; they are not required to possess any college education, and, at most, are required to take a few weeks of on-the-job training and pass a "common sense" test. They are compensated differently from production and maintenance employees.[12] There is no interchange be-

[12] One trainee testified that he had been earning $7.66 per hour as a production employee in the bacon department. On becoming an industrial engineer, he earned $375 per week but no longer received overtime.

tween them and production and maintenance employees. Two industrial engineers were temporarily assigned to perform production tasks in a newly created production area until the Employer placed production employees in that area. These duties encompassed approximately 2 hours per week for 2 months. They also performed "leaker" checks on an as-needed basis, identical to those performed by production employees. Of the three industrial engineers employed at the time of the hearing, two had transferred from production and maintenance positions.

The Board has consistently found that timestudy employees are not supervisory, managerial, or confidential employees.[13] Timestudy employees are often excluded from production and maintenance units by the parties,[14] or found to be technical employees and either excluded from production and maintenance units under *Sheffield Corp.*[15] or included in a separate technical unit with other technical employees,[16] or given a separate unit.[17]

[13] See, *e.g.*, *Case Corp.*, 304 NLRB 939 (1991). In the instant case, no party argues that industrial engineers should be excluded because they are supervisory, managerial, or confidential employees.

[14] See, e.g., *Van Gorp Corp.*, 240 NLRB 615 (1979); *United Technologies Corp.*, 274 NLRB 504 (1985).

[15] 134 NLRB 1101 (1961). See also *Reliable Castings*, 236 NLRB 315 (1978).

[16] See, e.g., *Chrysler Corp.*, 192 NLRB 1208 (1971).

[17] *Case Corp.*, supra; *Ford Motor Co.*, 66 NLRB 1317 (1946). Joint Petitioners assert that industrial engineers should be excluded because, inter alia, they are technical employees. Joint Petitioners claim that they have special skills, make determinations that directly affect production and maintenance employees' compensation, use independent judgment, are paid differently, and are separately supervised. Contrary to the Joint Petitioners, we find that industrial engineers are not technical employees. There is no evidence of any special requirements for becoming an industrial engineer, they receive minimal on-the-job training, and

In the instant case, we find, contrary to the Regional Director, that industrial engineers do not share a sufficiently strong community of interest with production and maintenance employees such that their inclusion in the petitioned-for unit is mandated. Indeed, the interests of the industrial engineers are separate and distinct from the interests of the production and maintenance employees.[18] Industrial engineers are separately supervised; spend half of their time in their office, which is located away from the production floor; do not interchange with production and maintenance employees; and they are differently compensated. Further, industrial engineers primarily perform different functions from those performed by production and maintenance employees, even though their functions are related to the production process in that they ensure that the Employer's operations are carried out with maximum efficiency and at minimum cost. The occasional production tasks that industrial engineers may perform are only incidental to their primary function of calculating production standards, and there is no evidence that production employees ever perform the industrial engineers' functions. Moreover, although they have some contact with production and maintenance employees, this contact is limited to occasional questions about the workflow and does not justify their inclusion in the unit.

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they do not appear to exercise independent judgment and discretion. Thus, we do not exclude the industrial engineers on that basis. Compare *Reliable Castings*, 236 NLRB 315 (1978). There, the Board found that timestudy employees were technical employees based on their special skills, their exercise of independent judgment, and their special education and training.

[18] Cf. *University of Hartford*, 295 NLRB 797 (1989). There, it was noted that in *Georgetown University*, 200 NLRB 215 (1972), the Board drew an analogy between such a "blue collar" unit in a university setting and the usual production and maintenance unit in the industrial areas, noting that such a unit normally does not include office clerical or technical employees with manual workers. 295 NLRB at 798 fn. 5.

As is the case with respect to the quality assurance/lab technicians, there are some factors here which would support finding appropriate a production and maintenance unit including industrial engineers, should the Joint Petitioners have sought such a unit. Thus, industrial engineers perform production-related functions, have some contact with production and maintenance employees, share the same benefits and holidays, receive on-the-job training, and are subject to the same personnel rules. As noted above, however, the petitioned-for unit need only be an appropriate unit, and in this case there is no labor organization seeking to represent a broader unit including industrial engineers. We conclude that industrial engineers do not share such a close community of interest with the petitioned-for production and maintenance employees as to require their inclusion in the unit. See *Penn Color*, supra.

In summary, we reverse the Regional Director's supplemental decision with respect to his finding that the petitioned-for unit must also include quality assurance/lab technicians, temporary management trainees I, lab technicians, and industrial engineers, and we sustain the challenges to those employees' ballots. We deny the Joint Petitioners' request for review with respect to the inclusion of the waste management operator. Finally, we find it unnecessary to consider the Joint Petitioners' request for review with respect to the receiver's alleged status as a guard. In light of our Decision sustaining the challenges to the ballots of the disputed employees listed above, we find it unnecessary to resolve the challenge to the receiver's ballot as his vote is not determinative of the election results.

ORDER

The Employer's request for review and motion to strike are denied. The Joint Petitioners' request for review is granted with respect to the Regional Director's finding that quality assurance/lab technicians, management trainees I, lab technicians, and industrial engineers must

be included in the petitioned-for-unit, his decision as to those employees is reversed, and the challenges to their ballots are sustained. In all other respects, the Joint Petitioners' request for review is denied, except that the challenge to the ballot cast by the receiver shall remain unresolved, as it is not determinative of the election results.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the Joint Petitioners, United Food and Commercial Workers Union, Local 204, AFL-CIO, and International Union of Operating Engineers, Local 465, AFL-CIO, and that the Joint Petitioners are the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees, janitorial employees, condensate drivers, waste management operators, raw material handler/cleaners, stockers, emergency room technicians, first aid attendants, kill gang leaders, and plant clericals, including inventory control section leaders, office clerks B & C (inventory control), distribution service section leaders, office supplies section leaders, and office clerks A, B & C (supplies/distribution) employed by the Employer at its Clinton, North Carolina facility, but excluding long-haul drivers, co-drivers, short-haul drivers, sales route drivers, permanent livestock drivers, temporary livestock drivers, outside buyers, hog buyers, assistant hog buyers, assistant hog buyers p.m., tire changers, vehicle mechanics, vehicle refrigeration mechanics, laborers (garage a.m. and p.m.), industrial engineers, industrial engineer trainees, laboratory technicians, quality assurance technicians, temporary management trainees I, process sales coordinators, trip audit entry section

> leaders, office clericals, confidential employees, guards, and supervisors as defined in the Act.[19]

MEMBER STEPHENS, dissenting.

Contrary to the majority, I would affirm the Regional Director's determination that the Petitioners' challenges to the ballots of the quality assurance/lab technicians and lab technicians (QALTs) and the industrial engineer and industrial engineer trainees (IEs) should be overruled. The Board has routinely included quality control employees in production units when a community of interest between the two groups has been shown to exist. *Blue Grass Industries*, 287 NLRB 274, 299 (1987); *Owens-Illinois, Inc.*, 211 NLRB 939, 941 (1974); *W. R. Grace & Co.*, 202 NLRB 788, 789 (1973). This is particularly true where it has been established that quality control employees perform functions that are integral to the production process in addition to sharing a community of interest with the production employees. Moreover, the Board has included such employees in the unit on the basis of their community of interest without regard to the petitioning labor organization's desire to exclude them. *W. R. Grace & Co.*, supra. See also *Blue Grass Industries*, supra (quality control employees included in the production and maintenance unit contrary to the General Counsel's position; unclear which party challenged their ballots). Cf. *Beatrice Foods*, 222 NLRB 883 fn. 3 (1976) (challenges to ballots of quality control employees sustained in view of lack of community of interest; unclear which party challenged their ballots).

In the instant case, the majority concedes that the QALTs share a community of interest with other employees in the production unit. Moreover, it is a given that the QALTs, who spend 80 percent of their time on

[19] The receiver is neither included in nor excluded from the bargaining unit covered by the certification issued herein, inasmuch as we have not determined his alleged guard status.

the production floor, perform an integral function in the meat processing and packing operation. Notwithstanding the foregoing, the majority sustains the challenges to the QALTs' ballots in large part because the Petitioners do not seek to represent them. The majority takes the position that the QALTs can be included, over the Petitioners' objection, only when they have an "overwhelming" community of interest with the other unit employees. The only case cited for this proposition is *Penn Color*, 249 NLRB 1117 (1980) and that case does not set forth so stringent a test.

In sum, my colleagues disregard the precedent cited above and derogate the Board's policy against fragmenting production and maintenance units.

Similarly, a community of interest has been shown to exist between the IEs and the production unit employees. IEs spend 50 percent of their time on the plant floor and perform some unit work in addition to having the same holidays and benefits. For the reasons set forth by the Regional Director, I would include them in the unit as well.

APPENDIX K

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 12-RC-7606

THE LUNDY PACKING COMPANY, INC.
Employer

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 204, AFL-CIO, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO
Joint-Petitioners

ORDER

Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election raises a substantial issue solely with respect to the eligibility of Darrell Coleman, who is employed as an Electrician A at the Employer's Gold Banner facility; and the unit placement of the industrial engineer and industrial engineer trainees, and laboratory technicians, quality assurance/laboratory technicians, and temporary management trainees I. The Board concludes, however, that these issues may best be resolved through the challenged procedure. Accordingly, the Decision is amended to permit the above-listed employees to vote by challenged ballot, and the Employer's Request for Review is denied in this and all other respects. The Employer's Motion to Stay the Election is denied. Joint Petitioners' Request for Review of the Acting Regional Director's Decision and Direction of

Election raises a substantial issue solely with respect to whether the single employee classified as a "receiver" is a guard within the meaning of Section 2(3) of the Act. The Board concludes, however, that this issue also may best be resolved through the challenge procedure. Accordingly, the Decision is amended to permit the Receiver to vote by challenged ballot, and the Joint Petitioners' Request for Review is denied in this and all other respects.

JAMES M. STEPHENS, Chairman
DENNIS M. DEVANEY, Member

Member Raudabaugh, dissenting in part:

I would grant the Employer's Request for Review with respect to the sufficiency of the Joint Petitioners' showing of interest, including particularly the issue of whether *St. Louis Independent Packing Co.*, 169 NLRB 1106, 1107 (1969), was correctly decided.

JOHN NEIL RAUDABAUGH, Member

Dated, Washington, D.C., June 3, 1993.

APPENDIX L

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

March 25, 1996

Mr. Laurence Gold
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, DC 20006

Re: United Food and Commercial Workers Union, Local 204, AFL-CIO and International Union of Operating Engineers, Local 465, AFL-CIO v. Lundy Packing Company, et al. Application No. A-792

Dear Mr. Gold:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on March 25, 1996, extended the time to and including May 1, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER
Clerk

By /s/ Jeffrey D. Atkins
JEFFREY D. ATKINS
Assistant Clerk

No. 95-1790

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 204, AFL-CIO AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,
PETITIONERS

v.

LUNDY PACKING COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether the court of appeals' refusal to permit the National Labor Relations Board to count the challenged ballots of the employees whose exclusion from a bargaining unit was the sole ground for the court's denying enforcement of an unfair labor practice order based on a presumptively valid secret ballot election so exceeded the scope of its reviewing authority under the National Labor Relations Act and so departed from the accepted and usual course of judicial proceedings as to warrant summary reversal.

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UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 204, AFL-CIO AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,
PETITIONERS

v.

LUNDY PACKING COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) denying enforcement of the order entered by the National Labor Relations Board (Board) in the unfair labor practice proceeding is reported at 68 F.3d 1577. The subsequent orders of the court relevant to the petition (Pet. App. 22a-28a) are unreported. The decision of the Board in the representation proceeding certifying the results of the election (Pet. App. 37a-50a) is reported at 314 N.L.R.B. 1042. The order of the Board finding an unfair labor practice

based upon its certification of the election (Pet. App. 29a-36a) is listed in the Board's records as 315 N.L.R.B. No. 159 but is not yet reported. The subsequent orders of the Board relevant to the petition (Pet. App. 14a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1995. A petition for rehearing was denied on January 2, 1996. Pet. App. 12a. On March 25, 1996, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 1, 1996. The petition was filed on May 1 and docketed on May 2, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Respondent Lundy Packing Company (Lundy) operates a pork products plant in Clinton, North Carolina, that employs about 880 workers. In March 1993, two unions—the United Food and Com-mercial Workers and the International Union of Operating Engineers (collectively, the Union)—filed a petition with the Acting Regional Director of the National Labor Relations Board (Board) pursuant to Section 9(c) of the National Labor Relations Act (Act), 29 U.S.C. 159(c), seeking jointly to represent a bargaining unit composed of specified production and maintenance employees of Lundy.[1] Lundy and the

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[1] Section 9(c) of the Act, 29 U.S.C. 159(c), provides in relevant part:

> (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> —
>
> (A) by * * * any * * * labor organization acting in [the employees'] behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, * * *
>
> * * * * *
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Union disagreed over the appropriate composition of the bargaining unit in which to hold a representation election.[2] Lundy proposed a "wall-to-wall unit"—*i.e.*, a unit consisting of all of its employees—whereas the Union proposed a unit excluding approximately 213 employees. Pet. App. 2a.

In May 1993, after a hearing, the Acting Regional Director determined that the appropriate bargaining unit was the unit proposed by the Union, with some additions, and scheduled an election in that unit.

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[2] Section 9(a) of the Act, 29 U.S.C. 159(a), provides in relevant part that the "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment." Section 9(b) of the Act, 29 U.S.C. 159(b), authorizes the Board to "decide in each case * * * the unit appropriate for the purposes of collective bargaining."

Lundy requested pre-election review of that determination by the Board. The Board directed that its "challenged ballot" procedure be used for employees in certain job classifications that Lundy wanted included in, but that the Union wanted excluded from, the unit. Pet. App. 2a-3a, 51a-52a. Under that procedure, when a representation election is held in a bargaining unit the composition of which is disputed, employees in the disputed job classifications cast a secret ballot for or against the Union, and their ballots are impounded. Thereafter, if the impounded, or "challenged," ballots are sufficient in number to affect the results of the election, an investigation is conducted; a hearing is held, if necessary; and a decision is made on whether the challenged ballots should be opened and counted. 29 C.F.R. 102.69(a), (b), (c), and (g); NLRB Casehandling Manual (Part Two) Representation Proceedings §§ 11338, 11344 (1989).

In June 1993, the election was held. The Union won by a vote of 318 to 309. That vote did not, however, reflect 24 challenged ballots, which were sufficient in number to change the outcome. Pet. App. 3a, 38a. In July 1993, after an administrative investigation, the Regional Director issued a decision ordering that certain challenged ballots—including those of nine quality control employees and three industrial engineers—be opened and counted. *Id.* at 38a & n.2, 47a. On the Union's appeal of that decision, the Board reversed, holding that those 12 employees were not properly included in the bargaining unit. *Id.* at 3a, 38a-47a, 49a-50a. The exclusion of those 12 employees, together with the exclusion of four other employees whose status was not questioned before the Board (*id.* at 38a n.2), left the Union's 318 to 309 majority intact, since the eight remaining challenged ballots (of the

original 24) were too few in number to change the election outcome. In September 1994, the Board certified the Union pursuant to Section 9(c) of the Act (29 U.S.C. 159(c), note 1, *supra*) as the exclusive bargaining representative of the bargaining unit in which the election had been held. Pet. App. 48a-49a.

b. Thereafter, Lundy refused to bargain with the Union, prompting the Union to file unfair labor practice charges. Pet. App. 3a. The Board's General Counsel issued a complaint alleging that Lundy's refusal to bargain violated Sections 8(a)(1) and 8(a)(5) of the Act. Pet. App. 29a.[3] In defending against the unfair labor practice charge, Lundy contended, *inter alia*, that the Board had erred in determining the scope of the appropriate bargaining unit. See *id.* at 30a. The Board granted summary judgment for the General Counsel and entered an order that, *inter alia*, re-quired Lundy to bargain with the Union. *Id.* at 33a-34a.

2. Upon Lundy's refusal to comply with the Board's bargaining order, the Board applied for enforcement of that order in the United States Court of Appeals for the Fourth Circuit. The court's jurisdiction was predicated on Sections 10(e) and 9(d) of the

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[3] Section 8(a) of the Act, 29 U.S.C. 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Act, 29 U.S.C. 160(e) and 159(d), which authorize judicial review of an unfair labor practice order that is based upon the facts certified in a representation proceeding.

The court of appeals denied enforcement of the Board's order. Pet. App. 1a-11a. It held that the Board had improperly excluded the nine quality control employees and the three industrial engineers from the bargaining unit. *Id.* at 1a-2a, 6a n.1. The court determined that, in excluding those 12 employees, the Board had given undue weight to the Union's preference as to the appropriate bargaining unit, in contravention of Section 9(c)(5) of the Act.[4] The court concluded its opinion by stating (Pet. App. 11a):

> We do not reach respondent's other assignments of error. For the foregoing reasons, we deny enforcement of the Board's order.
>
> ENFORCEMENT DENIED.

The Union petitioned for rehearing, urging the court to remand the case to permit the Board to provide a further explanation of its exclusion of the twelve employees. The Board, however, decided not to seek rehearing but instead to resume the processing of the representation case in accordance with the court's decision. Accordingly, following the denial of the Union's petition for rehearing on January 2, 1996, and the issuance of the court's mandate on January 10, 1996, the Board issued an order on February 6,

[4] Section 9(c)(5), 29 U.S.C. 159(c)(5), provides that, when the Board determines whether a bargaining unit is appropriate for purposes of collective bargaining, "the extent to which the employees have organized shall not be controlling."

1996, as amended on February 9, 1996, remanding the representation case to the Regional Director to determine the proper disposition of the challenged ballots. Pet. App. 12a-18a.

On February 9, 1996, the Regional Director gave notice that, on February 16, 1996, 14 challenged ballots would be opened and counted—those of the nine quality control and three industrial engineer employees that the court held had been improperly excluded from the unit, plus two other employees (the waste management operator and the finished product loader/cleaner) whom the Board had previously found eligible for inclusion in the bargaining unit but whose ballots had not been opened because they would not have changed the election outcome. Pet. App. 19a-21a, 38a n.2.

3. Lundy sought contempt sanctions and a writ of mandamus in the court of appeals, contending that the Board had no authority to take any further action in the representation case. See Pet. App. 24a. In an order dated February 15, 1996, the court denied mandamus and declined to hold the Board in contempt but expressed agreement with Lundy's position. *Id.* at 22a-25a. The court stated that its decision to deny enforcement of the bargaining order, without remanding the case to the Board, "terminat[ed] all administrative proceedings relating to the case" (*id.* at 23a), and that "the attempt by the Board to revive the representation petition and the election that followed exceeds the Board's jurisdiction" (*id.* at 24a). The Board moved for reconsideration of the court's order.

In a second order, dated March 21, 1996, the court of appeals denied reconsideration and reiterated its view that, in the absence of a remand, the Board lacked

authority to open and count the ballots of the 12 employees whom, the court had held, should have been included in the bargaining unit. Pet. App. 26a-28a. In addition, the court suggested for the first time that its refusal to enforce the Board's bargaining order may not have been based solely on the Board's exclusion of the 12 employees.[5] The court stated (*id.* at 27a):

> Numerous problems inhered in the conduct of this particular election: (1) the manner in which two separate representation campaigns were consolidated; (2) the determination of the bargaining unit; (3) the evidence of election misconduct (electioneering, intimidation, and the failure to accommodate Spanish-speaking voters); and (4) the Board's unexplained delay in issuing its decision on the challenged ballots. As a result, in *N.L.R.B.* v. *Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), this court denied enforcement of the Board's bargaining order *outright*, disposing of the petition on the basis of the Board's improper bargaining unit determination.

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[5] In its opinion of November 3, 1995, the court addressed only the exclusion from the bargaining unit of the nine quality control employees and three industrial engineers and stated that it "d[id] not reach respondent's other assignments of error." Pet. App. 11a; see also *id.* at 23a ("In [the November 3 opinion], this court addressed the Board's bargaining unit determination for a production and maintenance unit at Lundy Packing Company's Clinton, North Carolina facility. In that case, we denied the Board's request to enforce its bargaining order against Lundy.").

ARGUMENT

Under the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.*, the National Labor Relations Board (Board) is entitled to resume processing a representation proceeding after a court has refused to enforce an unfair labor practice order that is based on facts certified in that proceeding, regardless of whether the court has remanded the case to the Board. The justification for that statutory scheme is illustrated with unusual clarity in this case. The court of appeals refused to enforce a bargaining order based on a Board-supervised election involving more than 600 unit employees solely on the ground that the Board had improperly excluded 12 employees from the bargaining unit. The logical and legally appropriate remedy for the improper exclusion of those employees was to include them; the Board accordingly proposed to open and count the votes of those employees, which had been cast, but not previously opened or counted, pursuant to the Board's well-established "challenged ballot" procedure. By erroneously refusing to allow the Board to tabulate the challenged ballots, the court of appeals nullified the exercise by more than 600 employees of their right under the Act to choose their bargaining representative or to refrain from doing so. See 29 U.S.C. 157. The court's error is so clear that summary reversal is appropriate.

The Board did not itself petition for a writ of certiorari because the court of appeals' decision does not necessarily require any change in the Board's procedures in representation cases. The court's misperception that the Board's action in this case was "unusual" and an attempt to "bypass [the] court" (Pet. App. 27a) suggested that the problem might be

avoided in future cases if the court were made aware that, when a court denies enforcement of a bargaining order based on an election, the Board routinely resumes processing the representation case in accordance with the court's decision denying enforcement.[6] The court's orders prohibiting the Board from taking that action could nevertheless create uncertainty about the Board's authority in that situation. Moreover, as noted above, the court's action erroneously deprives private parties of their statutory rights, and the error is clear. We therefore support the petition for summary reversal.

1. It has long been settled that federal courts ordinarily cannot directly review the Board's exercise of its authority under Section 9(c) of the Act to investigate representation disputes, conduct representation elections, and certify the results of such elections. *Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964); *NLRB* v. *Falk Corp.*, 308 U.S. 453 (1940). The Court has recognized an exception to that principle only in "extraordinary circumstances" (*Boire*, 376 U.S. at 479), when the Board has exceeded its delegated powers and violated a clear and mandatory prohibition that could not, in the absence of direct review, be enforced at the instance of the party who is the intended beneficiary of the prohibition. See *Leedom* v. *Kyne*, 358 U.S. 184, 188-191 (1958); see also *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963). Apart from that exception, which does not apply here, Congress has authorized only an "indirect method of obtaining judicial review" of the Board's rulings in

[6] See, *e.g.*, *Medina County Publications*, 274 N.L.R.B. 873 (1985); *Deming Div., Crane Co.*, 225 N.L.R.B. 657, 657 n.3 (1976).

representation proceedings. *Boire*, 376 U.S. at 477. Under that method, review is available only to the extent that the representation proceeding provides the basis for an unfair labor practice order. See *id.* at 477-479; *AFL* v. *NLRB*, 308 U.S. 401, 410 & n.3 (1940). The court of appeals in this case plainly overstepped the statutory limits on judicial review applicable in that context.

Section 10(e) and (f) authorize judicial review of an unfair labor practice order upon a petition for enforcement filed by the Board or upon a petition for review filed by any person aggrieved by the order. 29 U.S.C. 160(e) and (f). Section 9(d) of the Act applies when, as here, the unfair labor practice order is "based in whole or in part upon facts certified following an investigation pursuant to" Section 9(c) of the Act. 29 U.S.C. 159(d); see also *Boire*, 376 U.S. at 477. Section 9(d) states in relevant part:

> [S]uch certification and the record of [the] investigation [in the representation proceeding] shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

The "order of the Board" referred to in Section 9(d) is the order entered in the unfair labor practice proceeding as a remedy for an employer's refusal to bargain with the certified representative. The certification and the record of the investigation in the representation proceeding are made part of the record before the court only in order to facilitate review of

the unfair labor practice order. Section 9(d) limits the actions that a court can take to actions affecting that order; the court may "enforc[e], modify[], or set[] aside in whole or in part the order." 29 U.S.C. 159(d). Section 9(d) does not give the court of appeals general authority over the underlying representation proceeding.

The court of appeals in this case plainly exceeded its authority under Section 9(d) in prohibiting the Board from opening and counting the ballots of the employees that, the court held, were improperly excluded from the bargaining unit. The court's authority was limited to reviewing the unfair labor practice order requiring Lundy to bargain with the Union. Of course, that authority necessarily encompassed the authority to review the legal and factual determinations underlying the order. Thus, it was proper for the court to review the Board's determination of the appropriate bargaining unit in which to hold the election on the basis of which the Union was certified as the exclusive bargaining representative. Here, however, the court of appeals went beyond reviewing the determinations made by the Board in the representation proceeding. It asserted control over the Board's conduct of the representation proceeding itself, by purporting to "terminat[e] all administrative proceedings relating to the case." Pet. App. 23a.

To be sure, a court's decision denying enforcement of an unfair labor practice order based on a representation proceeding may affect the Board's future conduct of that proceeding. The court's decision in this case precluded the Board from holding a new election in a unit that excluded the 12 employees that, the court held, should be included in the unit. In

other cases, a court's decision could conclusively determine the validity of a prior election. That would be true, for example, if a court upheld an employer's objections to the validity of the election[7] or determined that the Board had erred in voiding a vote against the union that, if counted, would make a union majority arithmetically impossible.[8] Even if a court denies enforcement of an order on the ground that the election was invalid, however, its decision does not terminate the representation proceeding, as the court in this case believed (Pet. App. 23a). The Board retains the authority, for example, to direct a new election upon the previously filed election petition in a bargaining unit that is consistent with the court's decision.[9]

Moreover, it bears emphasis that the court's decision in this case did *not* find the election invalid. Compare *ITT Lighting Fixtures* v. *NLRB*, 718 F.2d 201 (2d Cir. 1983) (collecting cases in which reviewing courts both denied enforcement and set aside the election). The court held that the Board had erred in determining the bargaining unit, but the court

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[7] *E.g.*, *KI (USA) Corp.* v. *NLRB*, 35 F.3d 256 (6th Cir. 1994); *NLRB* v. *Carroll Contracting & Ready-Mix*, 636 F.2d 111 (5th Cir. 1981); *Summa Corp.* v. *NLRB*, 625 F.2d 293, 295-296 (9th Cir. 1980); *NLRB* v. *Producers Cooperative Ass'n*, 457 F.2d 1121, 1126-1127 (10th Cir. 1972).

[8] See, *e.g.*, *NLRB* v. *Wrape Forest Industries, Inc.*, 596 F.2d 817, 818 (8th Cir. 1979); *NLRB* v. *Tobacco Processors, Inc.*, 456 F.2d 248 (4th Cir. 1972).

[9] See *KI (USA) Corp.*, 316 N.L.R.B. 1038 (1995) (directing a second election following the denial of enforcement of the Board's bargaining order based on the initial election); *Medina County Publications*, 274 N.L.R.B. 873 (1985) (same); *A.G. Parrott Co.*, 255 N.L.R.B. 259 (1981) (same).

expressly refrained from ruling on Lundy's other assignments of error. Pet. App. 11a. The court's holding regarding the appropriate bargaining unit did not impugn the election, especially since the employees that were held to have been improperly excluded from the unit were permitted to vote.[10] The court's holding merely required that those employees be included in the bargaining unit and that their votes be counted in any representation election in the unit.

In sum, neither the court's refusal to enforce the bargaining order nor the court's reason for that refusal precluded the Board from tabulating the votes of the excluded employees pursuant to its long-established "challenged ballot" procedure. Accordingly, the Board's authority to tabulate those votes did not depend on the court's remanding the case to the Board.[11]

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[10] Because the challenged vote procedure provided a record of the excluded employees' wishes regarding representation, this is not a case in which a prohibition on further proceedings could be justified on equitable grounds such as fading memories, unavailable witnesses, or the additional passage of time and employee turnover that would accompany further proceedings on remand. See *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d 1087, 1094-1095 (7th Cir. 1984); *NLRB* v. *Katz*, 701 F.2d 703, 709 (7th Cir. 1983); *Mosey Mfg. Co.* v. *NLRB*, 701 F.2d 610 (7th Cir. 1983) (en banc); *NLRB* v. *Connecticut Foundry Co.*, 688 F.2d 871 (2d Cir. 1982); *NLRB* v. *Nixon Gear, Inc.*, 649 F.2d 906 (2d Cir. 1981); cf. *NLRB* v. *Hub Plastics, Inc.*, 52 F.3d 608, 614-615 (6th Cir. 1995); *Kusan Mfg. Co.* v. *NLRB*, 749 F.2d 362, 366 (6th Cir. 1984).

[11] None of the decisions cited by the court of appeals (Pet. App. 23a-24a) for the contrary proposition involved judicial review under Section 9(d) of the Act, and thus none addresses the Board's authority to resume the processing of a representation case after a court denies enforcement of an unfair labor practice order based on facts certified in the representation case. In *International Union of Mine Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-344 (1945), cited at Pet. App. 23a, this Court held that, after the court of appeals had enforced a remedial order entered by the Board in an unfair labor practice proceeding, the Board was not entitled, in the absence of fraud or mistake, to have the court's enforcement order vacated so that the Board could enter a new remedial order that, in retrospect, it decided was more appropriate. Similarly, in *W.L. Miller Co.* v. *NLRB*, 988 F.2d 834, 836-838 (8th Cir. 1993), cited at Pet. App. 24a, the court held that, after it had enforced a remedial order against an employer entered by the Board in an unfair labor practice proceeding, the Board lacked authority to reopen the proceeding in order to award additional relief against the employer. In *George Banta Co.* v. *NLRB*, 686 F.2d 10, 16-17 (D.C. Cir. 1982), cert. denied, 460 U.S. 1082 (1983), cited at Pet. App. 23a, the court *rejected* an employer's argument that the Board lacked jurisdiction to adjudicate charges of post-strike unfair labor practices while a case against the same employer concerning pre-strike unfair labor practices was pending in a court of appeals. Finally, in *Service Employees Int'l Union Local 250* v. *NLRB*, 640 F.2d 1042, 1044-1045 (9th Cir. 1981), cited at Pet. App. 23a, the court, applying the doctrine of res judicata, upheld the Board's conclusion that it lacked jurisdiction to adjudicate a union's claim that an employer had committed an unfair labor practice, when the same claim had been implicitly rejected in an earlier court of appeals decision involving the same facts.

2. Even if it is assumed that a remand from the court was required for the Board to tabulate the votes of the improperly excluded employees, the court of appeals' failure to remand the case to the Board so far departed from the accepted and usual course of judicial proceedings as to warrant summary reversal.

This Court has repeatedly stated, including in cases involving the Board, that "[w]hen an administrative agency has made an error of law, the duty of

the court is to 'correct the error of law committed by that body, and after doing so to remand the case to the [agency].'" *NLRB* v. *Pipefitters*, 429 U.S. 507, 522 n.9 (1977) (quoting *ICC* v. *Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901)); accord *South Prairie Constr. Co.* v. *Operating Engineers Local 627*, 425 U.S. 800, 803-806 (1976) (per curiam); *NLRB* v. *Food Store Employees*, 417 U.S. 1, 8-10 (1974). The court's duty to remand a case following a determination of agency error preserves the agency's authority to "enforc[e] the legislative policy committed to its charge" using the agency's own procedures. *South Prairie Constr.*, 425 U.S. at 806 (quoting *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940)); see also *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-525, 543-544, 549 (1978).

As this Court has stated in a context similar to the present one, "the function of the Court of Appeals ended when the Board's error on the [bargaining unit] issue was 'laid bare.'" *South Prairie Constr.*, 425 U.S. at 805-806 (quoting *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952)).[12] By failing thereafter to remand

[12] In *South Prairie Constr.*, upon charges filed by a union, an unfair labor practice complaint issued alleging that a company was obligated to bargain with the union pursuant to a collective bargaining agreement with a second company, because the two companies constituted a single employer for collective bargaining purposes. 425 U.S. at 801. The Board dismissed the complaint based on its determination that the companies were separate employers. *Id.* at 802. On the union's petition for review, the court of appeals held not only that the Board's resolution of the "employer" issue was incorrect but also that the appropriate bargaining unit was one comprising the employees of both companies. *Id.* at 802-803. This Court agreed with the company and the Board that "the Court of Appeals invaded the statutory province of the Board when it proceeded to decide the § 9 'unit' question in the first instance, instead of remanding the case to the Board so that it could make the initial determination." *Id.* at 803; see also *id.* at 803-806.

the case to allow the Board to resume the processing of the representation case, the court "invaded the statutory province of the Board." *South Prairie Constr.*, 425 U.S. at 803. The Board long ago made the determination, which this Court has upheld, that secret ballot elections are the preferred means for enabling employees to exercise their statutory right to choose a bargaining representative or refrain from doing so. *Linden Lumber Div., Summer & Co.* v. *NLRB*, 419 U.S. 301, 304 (1974); see also 29 U.S.C. 157. In Board elections, as in political elections, the challenged ballot procedure is a well-established means for allowing disputes about voting eligibility to be resolved in an orderly fashion (while minimizing disclosures that might compromise ballot secrecy). See *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 329-333 (1946).[13] The court prevented the Board from following the procedure that it has developed, in the exercise of its delegated authority, for facilitating employee free choice.

[13] See, *e.g.*, *Browning Ferris, Inc.*, 275 N.L.R.B. 292 (1985) (remanding to open and count challenged ballots of employees whose eligibility had been resolved and to issue an appropriate certification of the results of the election); *Lindberg Heat Treating Co.*, 245 N.L.R.B. 1133 (1979) (remanding to open and count the challenged ballot of an employee wrongfully excluded from the bargaining unit, to prepare a revised tally of ballots, and either to certify the outcome of the election if that ballot is determinative or, if not, to conduct a hearing to decide the validity of the remaining challenged ballot).

The court's action was not justified by the remark in its order of March 21, 1996, that "[n]umerous problems inhered in the conduct of this particular election." Pet. App. 27a. As discussed above, the court's opinion of November 3, 1995, denying enforcement of the bargaining order, addressed only one of the purported "problems": the Board's exclusion of 12 employees from the bargaining unit. The other three "problems" cited in the March 21 order—the consolidation of two separate union representation campaigns; alleged election misconduct; and the Board's allegedly undue delay in issuing a decision on the challenged ballots—were indeed before the court, having been asserted by Lundy in opposing enforcement of the Board's order. But the court expressly refrained in its November 3 opinion from addressing those other "assignments of error" (which the Board had contested). *Id.* at 11a. Thus, the court's subsequent suggestion on March 21 that the denial of enforcement occurred "[a]s a result" (*id.* at 27a) of those asserted errors is inaccurate. More fundamentally, the court's apparent assumption that Lundy's assertions had merit contravened the well-settled principle that a Board-supervised election is presumed to reflect the true desires of the employees and that the burden is on the challenger to show otherwise. See, *e.g.*, *NLRB* v. *Zelrich Co.*, 344 F.2d 1011, 1015 (5th Cir. 1965); *Liberal Market, Inc.*, 108 N.L.R.B. 1481, 1482 (1954). The court's disregard of that principle provides a basis for summary reversal. See *NLRB* v. *Mattison Machine Works*, 365 U.S. 123, 123-124 (1961).[14]

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[14] In *Mattison Machine Works*, the court of appeals refused to enforce an unfair labor practice order based on a representation proceeding "because the Board's notices of election contained a minor and unconfusing mistake." 365 U.S. at 123. This Court summarily reversed the court of appeals' decision, holding that "[i]t was well within the Board's province to find * * * that this occurrence had not affected the fairness of the representation election, particularly in the absence of any contrary showing by the employer, upon whom the burden of proof rested in this respect." *Id.* at 123-124.

Nor was the court of appeals' action justified by the fact, upon which the court relied (Pet. App. 23a, 27a), that the Board did not request a remand. For reasons discussed in Point 1, *supra*, a remand was not necessary for the Board to tabulate the challenged ballots of the improperly excluded employees. Moreover, if the court of appeals believed otherwise, it should have remanded the case on its own motion[15] or solicited the views of the parties on the proper disposition of the case. Although the court suggested that it was unfairly surprised by the Board's announcement of an intent to tabulate the challenged ballots (*id.* at 23a), the Board's proposal to do so should have come as no surprise. The whole purpose of the Board's well-established challenged ballot procedure is to avoid having to scrap the results of an entire election merely because of a few challenged votes, which even when counted might not alter the outcome of the election.[16]

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[15] See, *e.g.*, *NLRB* v. *Winnebago Television Corp.*, 75 F.3d 1208, 1212-1213, 1217 (7th Cir. 1996); *Kinney Drugs, Inc.* v. *NLRB*, 74 F.3d 1419, 1436-1437 (2d Cir. 1996); *National Posters, Inc.* v. *NLRB*, 720 F.2d 1358 (4th Cir. 1983); see also *NLRB* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 444 (1965) (Douglas, J., dissenting) (noting that the Court had ordered a remand without any request from the parties).

[16] The court compounds its error by suggesting in its March 21 order that a timely remand request would have

Moreover, the court of appeals' reliance on the Board's failure to request a remand improperly penalizes employees for the perceived shortcomings of the Board. See *NLRB* v. *Katz*, 369 U.S. 736, 748 n.16 (1962); *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264-266 (1969); *NLRB* v. *Hub Plastics, Inc.*, 52 F.3d 608, 614 (6th Cir. 1995). Rank-and-file employees are entitled to look to the Board for the protection of their voting rights. *Shoreline Enterprises of America, Inc.* v. *NLRB*, 262 F.2d 933, 944-946 (5th Cir. 1959). The Board's use of the challenged ballot procedure in this case reflected an effort to protect the voting rights of the more than 600 production and maintenance employees of Lundy who participated in the election. Once the court of appeals held that 12 of those employees were improperly excluded from the unit, the unit employees could reasonably look to the

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enabled the court in its initial opinion "to inquire in an orderly fashion into such relevant issues as the employee turnover that occurred at Lundy during the Board's delay." Pet. App. 27a. Strikingly, in the decision cited by the court in support of that suggestion, the court remanded the case to the Board to make that inquiry in the first instance. *Long Island College Hospital*, 310 N.L.R.B. 689 (1993), enforcement denied, 20 F.3d 76 (2d Cir. 1994); see also *NLRB* v. *Children's Hosp. of Michigan*, 6 F.3d 1147, 1153 (6th Cir. 1993) (noting that reviewing courts are not authorized to take evidence and cautioning against the consideration of employer claims of employee turnover and the like that were not supported by evidence introduced in the record before the Board); *NLRB* v. *Joclin Mfg. Co.*, 314 F.2d 627, 635 (2d Cir. 1963) (Friendly, J.) (leaving it to the Board to decide in the first instance whether "in view of the lapse of time, a new election, with a more clearly defined bargaining unit, * * * would serve the purposes of the statute more fully than further inquiry into this old and at best exceedingly close one").

Board promptly to tabulate the challenged ballots and redetermine the validity of its prior certification of the Union as the exclusive bargaining representative.[17] The court's subsequent orders of February 15 and March 21 frustrated the reasonable expectations that its own opinion created and showed little regard for the investment of time, emotion, and money that numerous directly affected private parties put into the election.

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[17] Because the Board's tabulation of the challenged ballots would have occurred pursuant to a familiar procedure and would not have consumed a significant amount of time, this is not a case in which a remand would have amounted to a new and unforeseen lawsuit being superimposed on an already protracted proceeding. See *NLRB* v. *Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 707-711 (7th Cir. 1976) (declining to remand in such a situation).

CONCLUSION

The petition for a writ of certiorari should be granted and the orders of the court of appeals precluding the Board from conducting further proceedings in the representation case should be summarily reversed.

Respectfully submitted.

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MAY 1996

(4)

No. 95-1790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 204, AFL-CIO AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,

Petitioners,

v.

THE LUNDY PACKING COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The court of appeals denied enforcement of a bargaining order issued by the National Labor Relations Board, finding that the Board had violated Section 9(c)(5) of the Act by illegally permitting the unions' extent of organization to control the scope of the bargaining unit. The court did not order the Board to either include the unlawfully excluded employee classifications or count the ballots cast by employees in these classifications. The court took no action apart from denying enforcement of the Board's order; that is, the court set aside the Board's order in whole. The question presented is:

> Once jurisdiction vests exclusively with the court of appeals over the Board's petition for enforcement of its bargaining order, does the Board retain any jurisdiction over the underlying representation proceeding so as to permit it to take any further action absent a remand or some other affirmative instruction from the court?

PARTIES TO THE PROCEEDING

Petitioners, United Food and Commercial Workers, Local 204, AFL-CIO and International Union of Operating Engineers, Local 465, AFL-CIO, were Intervenors below. Respondent The Lundy Packing Company, Inc. was Respondent below. Respondent National Labor Relations Board was Petitioner below.

Pursuant to this Court's Rule 29.6, Respondent The Lundy Packing Company, Inc. notes that it is a privately-held corporation; it has no parent company and, except as listed below, all subsidiaries are wholly owned:

L & S Farms

L & H Farms, L.L.C.

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STATEMENT OF THE CASE

After conducting separate campaigns, United Food and Commercial Workers, Local 204, AFL-CIO and International Union of Operating Engineers, Local 465, AFL-CIO (collectively the "Unions"), filed a petition seeking *jointly* to represent certain employees of The Lundy Packing Company, Inc. ("Lundy"). This petition, filed pursuant to Section 9 of the National Labor Relations Act, gave rise to a representation case before the Board. Lundy moved to dismiss the petition, challenging the Unions' "pooling" of authorization cards solicited by one or the other, but not both, labor organizations to meet the Board's administrative threshold of interest sufficient to conduct an election. The NLRB Regional Director denied the motion and a Board majority declined review.

Lundy proposed that all affected employees be combined into an appropriate unit; the Unions sought a unit of selected production and maintenance employees. Following a hearing, the Acting Regional Director ordered an election in a fragmented unit of production and maintenance employees closely resembling the one proposed by the Unions. The Unions and Lundy sought review of this decision. A Board majority denied both appeals but directed that employees in certain positions vote challenged ballots.

The election did not produce a majority result as challenged ballots became determinative of the outcome. Moreover, Lundy filed objections to the conduct of the election and to conduct affecting the results of the election.

After investigating the challenged ballots (but not Lundy's objections), the Regional Director issued a 71 page decision adopting for the most part Lundy's position on the

challenged ballots but overruling Lundy's objections to the election. Both the Unions and Lundy appealed.

Thirteen months later a re-constituted Board issued its decision. A Board majority substantially reversed the Regional Director on the challenged ballots issue, adopted the Director's decision rejecting Lundy's objections without a hearing, and certified the Unions as the exclusive collective bargaining representative of a unit that was nearly identical to the one sought by the Unions on appeal. The Board included only one employee (out of 642) over the Unions' objections. Board Member Stephens filed a dissent which essentially adopted the ruling by the Regional Director on the challenged ballots.

The representation proceeding thus ended.

To obtain review of the Board majority's decision, Lundy refused to bargain with the Unions. This refusal precipitated an unfair labor practice charge alleging that the Company violated Section 8(a)(5) and (1) of the Act. Following summary proceedings, the Board found a violation and ordered Lundy to bargain with the Unions. Lundy's continued refusal to bargain caused the Board to seek enforcement of its bargaining order by filing a petition in the United States Court of Appeals for the Fourth Circuit. The Unions intervened.

Lundy defended its refusal to bargain on five grounds: (1) the Board improperly accepted the "joint" petition; (2) the Board illegally accorded controlling weight to the extent of the Unions' organization at Lundy; (3) a unit of all affected employees was appropriate; (4) the Board's malfeasance, coupled with the Unions' misconduct, impermissibly tainted the election; and (5) the Board's unexplained delay in issuing its decision combined with the employee turnover at Lundy

warranted denial of the petition. During oral argument, the court solicited from Lundy's counsel his view on the appropriate remedy. Lundy's counsel discussed various options with the court, including ending the case by denying enforcement of the Board's order and the alternative of remanding the case to the Board for purposes of counting the contested ballots. Lundy's counsel argued that the facts in the record fully justified a decision by the court to end the case by denying enforcement. At no time did either the Board or the Unions ever suggest that a remand for counting the challenged ballots would be an appropriate alternative disposition of the case. They were willing to stand or fall on the record before the court.

On November 3, 1995, the fourth circuit denied enforcement of the Board's order; no portion of the case was remanded to the Board for further administrative action. The court concluded that the Board had violated the Act by giving controlling weight to the extent of the Unions' organization in fashioning the bargaining unit.[1] The court did ***not*** decree that the positions at issue be included in the unit. Rather, the court held that the Board had illegally ***excluded*** them from the unit. App. 6a-8a. Nowhere in its decision did the fourth circuit direct the Board to expand the unit, or otherwise define the precise scope of the unit. Indeed, the court had before it numerous additional unit placement issues which, along with other assignments of error, were not reached. App. 11a, 27a.

The Board did not file a timely motion for rehearing. Neither did the Board otherwise seek clarification as to the

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[1] *See* 29 U.S.C. § 159(c)(5) ("[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling"). Neither the Board nor the Unions challenge this determination.

meaning of the phrase "*ENFORCEMENT DENIED*." The Unions, however, filed a petition for rehearing and suggestion for rehearing *en banc*, requesting a remand so that the Board could conduct "further proceedings" in which to articulate, *after the fact*, a lawful reason for excluding certain job classifications from the unit. The fourth circuit denied the motion and issued its mandate.

One month later, some three months after the issuance of the court's initial order, the Board first reacted. Following meetings with the Unions and without prior notice to Lundy, the Board "reasserted" jurisdiction over the concluded representation proceeding and "remanded" the case to the Regional Director to count some of the challenged ballots. Lundy filed a motion to stay with the Board, arguing that it was without jurisdiction to take further action. The Board rejected the motion and, upon "remand," the Regional Director issued an order scheduling a ballot count.

To prevent the Board's illegal action, Lundy filed with the fourth circuit a motion to stay the ballot count, a motion to show cause why the Board should not be held in contempt, and a petition for a writ of mandamus and prohibition. On February 15, 1996, the court ruled that "the attempt by the Board to revive the representation petition and the election that followed exceeds the Board's jurisdiction." App. 24a. The court added: "We reiterate our earlier order that enforcement of the Board's bargaining order is denied and that this case is closed in all respects." App. 24a.

Not content with that explanation, the Board filed a motion for reconsideration of the court's February 15th order in which the Board contended that the court's decision of November 3, 1995 constituted some sort of remand, or, in the alternative, that a remand was not necessary because the

court's order was interlocutory in nature. App. 27a. The fourth circuit rejected these contentions and denied the motion. The court observed:

> Numerous problems inhered in the conduct of this particular election: (1) the manner in which two separate representation campaigns were consolidated; (2) the determination of the bargaining unit; (3) the evidence of election misconduct (electioneering, intimidation, and the failure to accommodate Spanish-speaking voters); and (4) the Board's unexplained delay in issuing its decision on the challenged ballots. As a result, in *N.L.R.B. v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), this court denied enforcement of the Board's bargaining order *outright*, disposing of the petition on the basis of the Board's improper bargaining unit determination.

App. 27a (original emphasis).

REASONS FOR DENYING THE WRIT

The Court's supervisory jurisdiction is neither necessary nor warranted in this case. There is no conflict of authority among the circuit courts on the issue presented. The Board chose not to petition for a writ of certiorari. It supports the Unions' petition only out of a vague concern of some future "uncertainty" over its authority to reopen a representation case without first seeking a remand. Bd. Br. 10. Indeed, the fourth circuit's orders do not "require any change in the Board's procedures in representation cases." Bd. Br. 9. A writ of certiorari should not issue under these circumstances. Moreover, as described below, the opinion and subsequent

orders of the fourth circuit are fully in accord with this Court's construction of the National Labor Relations Act.

The Unions' and the Board's real complaint is that the fourth circuit terminated the case without any remand. Because Congress vested that authority with the federal courts, the fourth circuit's order was precisely within statutory bounds. Cognizant of this tenet of labor law, the Unions and the Board (collectively "Petitioners") have instead constructed artful jurisdictional and separation-of-powers arguments designed to gain review. Neither the premise nor the conclusion of Petitioners' argument withstands scrutiny.

According to Petitioners, the Board retains exclusive jurisdiction over a representation proceeding which remains active unless and until the Board decides to close the matter. The Board, in other words, is free to revive a representation proceeding (which culminates with the certification of the election results) at any stage of judicial review without the consent of the court and notwithstanding its mandate.[2] Under this theory no case would end without the Board's acquiescence, and the decrees of reviewing federal courts would be subordinate to the Board's orders. Further, the Board would then have unlimited opportunities to seek enforcement of a bargaining order against the same employer but under new theories; the piecemeal litigation would end only when the Board was satisfied. Congress did not intend such a result when it enacted the statute giving reviewing federal courts

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[2]In fact, if the theory is correct, this case might have been moving in two different directions at the same time. The Board wanted to take the case back while the Unions wanted to petition for a writ of certiorari on the grounds that the fourth circuit erred in finding that the Board violated the Act. *See* Unions' Application for an Extension of Time (served 3/21/96) pp. 2-3. In this scenario, Lundy's rights and obligations would be impossible to determine.

exclusive jurisdiction. Petitioners' argument finds no support in the language of the Act or in this Court's decisions.

In addition, Petitioners are barred on procedural grounds from raising the issues presented in the application for a writ of certiorari. The fourth circuit in its November 3, 1995 order did not remand any part of the case to the Board, nor did it instruct the Board to take any action, least of all the counting of any challenged ballots. It became incumbent upon the Board or the Unions to timely file a petition for rehearing either to request a remand for the purpose of counting ballots or to obtain clarification as to whether the court's opinion permitted that action to be taken. They did not.

A. An elementary review of the Act demonstrates that the fourth circuit did not exceed its statutory jurisdiction by not remanding the case to the Board to count the challenged ballots.

The representation proceeding began when the Unions filed a petition and concluded when the Board certified the Unions as the collective bargaining representative of the unit employees. The Board's determinations on representation issues throughout this proceeding were not immediately appealable to the fourth circuit for review. Instead, the Act provides for postponed judicial review until "the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed." *Boire v. Greyhound Corp.*, 376 U.S. 473, 477 (1964). *See AFL v. NLRB*, 308 U.S. 401, 411 and n.3 (1940)(same); *ITT Lighting Fixtures v. NLRB*, 718 F.2d 201, 201 (2d Cir. 1983)(same), *cert. denied*, 466 U.S. 978 (1984). Thus an employer must first be adjudged guilty by the Board of committing an unfair labor practice in order to gain judicial review of the underlying certification order.

Lundy's refusal to bargain with the Unions resulted in a Board finding that the Company violated Section 8(a)(5) and (1), an order to bargain with the Unions, and the Board's petition for judicial enforcement of its order. Thus, the representation case and the unfair labor practice case became "as one,"[3] a final order of the Board subject to full judicial review. *Boire*, 376 U.S. at 477. The scope of review extends to all aspects of the merged case. *Id.*; *cf.* Bd. Br. 12 (court's "authority necessarily encompasse[s] the authority to review the legal and factual determinations underlying the order").

Section 10(e) provides that, upon notice and the filing of the record, "the jurisdiction of the court shall be ***exclusive***."[4] App. SA-5 (emphasis added). "There is no question that the Act intended to vest exclusive jurisdiction in the courts once the Board in the exercise of its discretion had reached its determination and applied for enforcement. This prevents conflict of authority." *International Union of Mine, Mill and Smelter Workers, Local No. 15 v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 342 (1945). It follows, therefore, that the Board no longer had jurisdiction over any aspect of the merged Lundy representation and unfair labor practice case once the agency filed the record with the fourth circuit. The Board's submission of its determination for judicial approval eliminated any "conflict of authority" between the court and the agency. *Id.*

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[3] *NLRB v. Ortronix, Inc.*, 380 F.2d 737, 739 (5th Cir. 1967).

[4] This exclusivity is illustrated by *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939), where the Board attempted to withdraw its petition after the record had been filed with the circuit court. The Court concluded that "the Board, in the presence of the court's continued and exclusive jurisdiction, remained without authority to deal with its order." *Id.* at 372.

Section 10(e) also empowers the reviewing court to "make and enter a decree . . . ***setting aside in whole*** . . . the order of the Board." App. SA-4 (emphasis added).[5] The fourth circuit exercised that authority when it denied enforcement of the Board's order. The court was under no "duty to remand." Bd. Br. 16. It must be remembered that this is not the typical case where a circuit court has found that the Board merely abused its discretion in fashioning an appropriate bargaining unit. In *Lundy* the Board acted illegally by creating a gerrymandered bargaining unit strictly at the behest of the Unions. This type of election fraud strikes at the heart of the democratic process, especially when the entity guilty of gerrymandering is the very agency charged with fairly administering the Act. Denying enforcement without a remand is the "logical and legally appropriate remedy"[6] for the Board's illegal activity.

Lastly, Section 10(e) provides that the fourth circuit's "judgment and decree shall be final." App. SA-5. This Court has previously addressed the effect of a "final" judgment of a circuit court:

> We are not dealing here with an administrative proceeding. That proceeding has ended and has been merged in a decree of a court pursuant to the directions of the National Labor Relations Act. The statute provides that if, in the enforcement proceeding, it appears that any

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[5] *See Ford Motor Co.*, 305 U.S. at 370 (the "breadth of the jurisdiction" conferred upon a court by § 10(e) includes setting aside in whole the Board's order) and at 372 (decision to allow the Board to conduct further proceedings "rest[s] in the sound discretion of the court").

[6] Bd. Br. 9.

> further facts should be developed the court may remand the cause to the Board for the taking of further evidence and for further consideration. (§ 10(e). But it is plain that the scheme of the Act contemplates that when the record has been made and is finally submitted for action by the Board the judgment "shall be final." It is to have all the qualities of any other decree entered in a litigated cause upon full hearing, and is subject to review by this court on certiorari as in other cases. (§ 10(e) supra).

Eagle-Picher Mining, 325 U.S. at 339 (footnote omitted).

It necessarily follows that the Board may not, "absent an order to remand or some express qualification in the judgment," unilaterally reopen the case and proceed on some new course. *Service Employees Int'l Union Local 250 v. NLRB*, 640 F.2d 1042, 1045 (9th Cir. 1981) (Kennedy, J.). The three challenged orders of the fourth circuit make clear that there was no remand or express invitation for the Board to reassume jurisdiction and that the entire case ceased with the court's November 3, 1995 order.

B. Contrary to the Unions' assertion, *NLRB v. Falk Corp.*, 308 U.S. 453 (1940), is not "directly on point."[7] Pet. 14. *Falk* involved a separate unfair labor practice proceeding consolidated with a representation proceeding. The employer had established a company union called the Independent. A different union, the Amalgamated Association of Iron, Steel and Tin Workers of North Carolina ("Amalgamated"), while engaged in an organizing drive, filed an unfair labor practice

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[7]Telling is the fact that the Board does not share the Unions' creative interpretation of *Falk*.

charge alleging that the company had unlawfully dominated the Independent. The Board found a Section 10 violation and petitioned the circuit court for enforcement of its order which required that the company disestablish the Independent.

Contemporaneously with its unfair labor practice charge, Amalgamated filed a petition for representation under Section 9. A third union, the Operating Engineers, intervened in the representation proceeding. The Board directed an election, placing Amalgamated and the Operating Engineers on the ballot, but excluded the Independent. No date had been set for the election pending a ruling by the circuit court in the unfair labor practice enforcement action. The representation case, therefore, had not eventuated in an unfair labor practice finding.

The circuit court enforced the Board's order to disestablish the Independent. The court, however, went on to modify the Board's direction of election to include the Independent on the ballot for the unscheduled election. This Court vacated the modification because that representation issue that was not before the circuit court.

No similarity to the facts of this case exists. The *Falk* unfair labor practice proceeding was a distinct proceeding; it did not grow out of the representation proceeding. This fact easily distinguishes *Falk* from *Lundy* in which the unfair labor practice proceeding "was merely the vehicle by which the Board's representation proceedings reached [the fourth circuit] for review." App. 23a-24a. In *Lundy*, the representation case was squarely before the fourth circuit for review.

C.

1. The Board asserts that it "***routinely*** resumes processing the representation case in accordance with the court's decision denying enforcement," citing *Medina County Publications*, 274 N.L.R.B. 873 (1985), and *Deming Division, Crane Co.*, 225 N.L.R.B. 657 (1976). Bd. Br. 10 (emphasis added). Reopening the Lundy representation proceeding was not part of any "routine" Board practice. These two cases are the most the Board's appellate counsel can identify after researching the issue for more than three months. Two decisions rendered over the course of the Board's 60 year history hardly constitutes a "routine." In any event, these cases do not support the inference that the Board has the authority to resuscitate a representation proceeding after a federal court has denied enforcement of a bargaining order.

In *Medina County* the circuit court denied enforcement of a Board bargaining order predicated on a union's election victory because the Board counted the ballot cast by a supervisor. Although the court did not remand the case, the Board did order a second election. However, the employer there did **not** contest the Board's action; instead, the employer was satisfied to proceed to another election. In fact, no new election ever occurred because the union withdrew its petition.[8]

In *Deming* the circuit court denied enforcement of a Board bargaining order predicated upon a union's election victory because of the Board's failure to consider the employer's objections to the election. Thereafter, the Board purported to direct a second election in the absence of a remand from the court. The employer objected because the Board

[8]Telephone interview with Martin S. List, Employer's Counsel of Record (May 29, 1996).

lacked jurisdiction and that the union's showing of interest was stale. The objection soon became moot. "Rather than continue with time-consuming litigation on this point, the Union withdrew its first petition for an election, obtained a fresh showing of interest, and filed a second petition for an election." *Crane Co., Deming Div.*, 244 N.L.R.B. 103, 105 (1979). For some unexplained reason, the Board failed to discuss this subsequent history of the case.

2. The Board next claims that a remand is unnecessary so long as the subsequent resurrection of the representation proceeding is "consistent with the court's decision." Bd. Br. 13. *KI (USA) Corp.*, 316 N.L.R.B. 1038 (1995), is cited for support, but similarly falls short. The circuit court denied enforcement of the Board's election-based bargaining order because the Board improperly dismissed the employer's election objection. The Board then purported to resume processing the representation case and ordered a second election. The employer was satisfied to proceed to another election and did not challenge the Board's authority to take the action. The employer prevailed in the second election.[9]

The other case cited by the Board is *A.G. Parrott Co.*, 255 N.L.R.B. 259 (1981). The circuit court denied enforcement of the Board's election-based bargaining order because of balloting irregularities. *NLRB v. A.G. Parrott*, 630 F.2d 212 (4th Cir. 1980). However, the court specifically instructed the Board to rerun the election: "it appears to us that the circumstances imperatively warrant the holding of another election, to permit a determination free of error, in which all ballots can properly be determined to be valid or invalid, and a proper decision made on the outcome. ENFORCEMENT

[9]Telephone Interview with Richard C. Hotvedt, Employer's Counsel of Record (May 29, 1996).

DENIED." *Id.* at 215 (footnote omitted). Again, for some unexplained reason, the Board failed to discuss this prior history of the case.

In summary, the Board cites a total of four cases, none from this Court or any of the circuit courts, to warrant its unilateral revival of the Lundy representation proceeding.[10] Each case is distinguishable. The Board's attempt to distinguish contrary decisions by this Court and the circuit courts is unavailing. Bd. Br. 14-15 n.11.

D. Petitioners' reliance on *South Prairie Construction v. Local No. 627, International Union of Operating Engineers*, 425 U.S. 800 (1976), and *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), to advance their "administrative usurpation" theory is misplaced. Neither case supports their position.

At issue in *South Prairie* was the employer's operation of two separate construction companies, only one of which was organized. The Operating Engineers represented the employees at the unionized business. When the non-union company began operating in the same territory as the unionized company, the union sought to extend the terms of its contract to the non-union company, arguing that the two companies were a "single employer." The employer refused to recognize the union as the representative for its non-union employees, provoking a Section 10 unfair labor practice charge that the

[10]One case is notably absent from the Board's brief. Before the fourth circuit, the Board relied upon a recent unpublished order in *BB&L, Inc. v. NLRB*, No. 93-1479 (D.C. Cir. Aug. 7, 1995). App. 27a. However, the Board in that case timely petitioned for a remand to count a challenged ballot. *BB&L* demonstrates that the Board's true routine is to seek permission from the reviewing court **before it will even consider opening challenged ballots**.

company unlawfully refused to bargain. The charge raised two distinct questions: whether the employer's two business entities were a "single employer" and, if so, whether the two groups of employees would be an appropriate bargaining unit.

The Board concluded that the two operating entities were not a single employer and, therefore, did not decide what bargaining unit would be appropriate. The union petitioned for judicial review. The circuit court concluded that the Board erred on the single employer issue. The court further decided to make the **initial** determination whether combining the two groups of employees would be an appropriate bargaining unit. This Court vacated only that part of the order, stating that for the lower court "to take upon itself the **initial** determination of this issue was incompatible with the orderly function of the process of judicial review." 425 U.S. at 805 (emphasis added and quotation omitted).

A comparison to *Lundy* is not apt. The circuit court's error in *South Prairie* was ruling on the appropriateness of the bargaining unit before the Board had exercised its discretionary authority in that area. Thus, the court had usurped the administrative function of the Board. In contrast, when the Board certified the Unions in this case and found Lundy guilty of refusing to bargain, the Board had already ruled on <u>all</u> of the representation issues raised in the case, including the challenged ballots. *See* App. 37a-50a. The representation issues were ripe for judicial review.[11]

[11]*South Prairie* reveals the irony of Petitioners' position. They repeatedly argue that the fourth circuit properly fashioned an appropriate bargaining unit by ***including*** certain employees who were illegally disenfranchised by the Board. *South Prairie*, however, prohibits the fourth circuit from fashioning a bargaining unit in the first instance; it is the province of the Board to determine an appropriate unit subject to judicial approval.

In *Pottsville Broadcasting*, this Court examined the appropriate scope of appellate review of administrative actions. In question was a writ of mandamus issued by a circuit court directing the FCC to consider the Pottsville Broadcasting license application standing alone and not in comparison with two other subsequent applications. Petitioners quote the passage, "an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." 309 U.S. at 145; Pet. 8. However, Petitioners neglect to explain that the quote comes not in the context of a circuit court terminating an appeal of a final administrative order, but rather, in the context of a remand. 309 U.S. at 145. The fact that a circuit court must respect the statutory authority of an agency when remanding the matter for further administrative proceedings does not support Petitioners' theory here that the fourth circuit was without jurisdiction to deny enforcement and terminate the case. In the case before the Court, the Board would turn Section 10(e) on its head -- the circuit court's order would be final only when the Board accepted it as final.

Eagle-Picher Mining[12] lays Petitioners' "administrative usurpation" theory to rest. In that case, the circuit court modified and enforced the Board's order finding that the company had unlawfully discharged 209 employees and directed reinstatement and back pay for them. The circuit court also adopted the Board's formula for calculating the back pay. Nearly two years later, the Board determined that a different back pay formula might have been more appropriate and,

[12]While *Eagle-Picher* did not involve review of a Board *representation* proceeding, the statutory basis for the circuit court's jurisdiction, Section 10(e), was the same as in *Lundy*.

despite interim compliance by the company, petitioned the court to vacate its earlier order to permit the new formula to be applied. The court dismissed the petition and the Board obtained review.

This Court framed the question presented as, "whether, despite a decree entered at the Board's behest, prescribing the method of enforcement of the relief granted by the Board, that body retains a continuing jurisdiction to be exercised whenever, in its judgment, such exercise is desirable and may, therefore, oust the jurisdiction of the court and recall the proceeding for further hearing and action." 325 U.S. at 339. "The petitioners' contention is that the nature and extent of the back pay remedy are primarily and peculiarly matters lying within the administrative discretion of the Board, and that a court's function is limited to imparting legal sanction." *Id.* at 340 (citations omitted). This Court, expressing concern that administrative flexibility not overwhelm the important principles of judicial certainty and finality, described the Board's theory as follows: "If the petitioners are right, it must follow that in any case in which the court refuses to remand, the Board need merely wait until the 'final' decree is entered and then proceed to resume jurisdiction, ignore the court's decree, and come again to it, asking its imprimatur on a new order." *Id.* at 341. But, as this Court made clear, the Board is not vested with the power to modify its orders once a federal court attains jurisdiction. "We are not dealing here with an administrative proceeding. That proceeding has ended and has been merged in a decree of a court pursuant to the directions of the National Labor Relations Act." *Id.* at 339.

The fourth circuit's orders simply do not preclude the Board from effectuating the purposes of the Act. The UFCW and/or the IUOE may begin a new organizing campaign and, if sufficiently supported by Lundy employees,

petition the Board for an election. Acquiescing in the court's order and learning from its past mistakes, the Board may then fashion an appropriate bargaining unit, without letting the petitioning union or unions dictate its scope, and afford all affected employees their statutory right to vote.

E. Following the fourth circuit's November 3, 1995 order, the Board did not request a remand but waited as the Unions alone filed a timely petition for rehearing, presumably so that, although their interests are identical in this regard, the Board's position would not suffer judicial rejection. When the court denied the petition, the Board simply proceeded to conduct further proceedings on its own initiative in a failed "end run" around the court's mandate. As explained in the court's order of February 15, 1996, "the Board had no such authority." App. 28a. The Board then petitioned for a rehearing, purportedly of the February 15th order, arguing that a remand was not jurisdictionally necessary or, in the alternative, that the November 3rd order constituted some sort of implied remand.

The fourth circuit properly viewed the Board's petition as an untimely petition for rehearing of the November 3rd order. The Board is a sophisticated and seasoned litigator that knows how to follow appellate rules to obtain reconsideration or clarification of orders. It is not entitled to preferential treatment unlike that granted to any other party. Because the substance of Petitioners' argument here relates only to the alleged jurisdictional dispute between the Board and the fourth circuit and that issue was not properly preserved by a timely petition for rehearing, the argument has been waived and is not available for review by this Court. A petition for a writ of certiorari is no substitute for a timely petition for rehearing.

Finally, Petitioners' newfound feelings of paternalism toward employee voting rights is profoundly hypocritical given the facts of this case. The Board unlawfully disenfranchised those who voted challenged ballots and prohibited Lundy's truck drivers, garage employees, the receiver, and dozens of other classifications from voting. With its unclean hands, the Board is not entitled to invoke the mantra of employee rights to cover its illegal acts. Rank and file employees may look to the Board for the protection of their voting rights, but in this case that protection was subordinated to the desires of the Unions.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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